IN THE COURT OF APPEAL OF TANZANIA
AT IRINGA

(CORAM: JUMA, C.J., WAMBALI, J.A., And SEHEL, J.A.)

CRIMINAL APPEAL NO. 315 OF 2018

THEOPHIL HAULE..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Chikoyo, J.)

Dated the 13th day of June, 2013
in
Criminal Sessions case No. 25 of 2014

JUDGMENT OF THE COURT

30th April & 3rd May, 2021

WAMBALI, J.A.:

The High Court of Tanzania sitting at Songea (Chikoyo, J.), convicted the appellant, Theophil Haule 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.

The information which was laid at the trial court alleged that on 22nd October, 2011 at Liula village within Songea Rural District in Ruvuma Region, the appellant murdered Fulko Haule.

We wish to note at the outset that in the circumstances of the appeal before us and for the interest of justice, we do not wish to revisit herein the detailed facts of the case that led to the conviction of the appellant.

At the trial, the prosecution paraded six witnesses and tendered one exhibit. Briefly, it was the prosecution evidence in support of the case against the appellant that on the fateful date around 19.00 hours the appellant who had gone to the deceased's house hit him twice on his head using a bamboo stick. As a result, the deceased fell down unconscious and, though he was rushed to Songea Regional Hospital for treatment, he passed away on 23rd October at 03.00 hours. Upon the said death, the appellant was arrested for unlawfully causing the death of the deceased.

On his part, the appellant defended himself as he had no witness to summon in support of his defence. Essentially, he spiritedly denied the allegation of unlawfully causing the death of the deceased on the contention that on the fateful date he was not at that particular place. He therefore maintained that he could not be held in connection with the death of the deceased.

At the conclusion of the trial, the trial judge believed the prosecution version of evidence and disbelieved the appellant's defence. Particularly,

she found that the evidence of the prosecution fully established that the case against the appellant was proved beyond reasonable doubt.

The finding of the trial court did not please the appellant, hence the instant appeal. Consequently, he lodged the Memorandum of Appeal comprising ten grounds of appeal. In short, the thrust of his complaint in this appeal is that the case for the prosecution was not proved to the hilt.

However, at the inception of the hearing of the appeal, Mr. Jally Willy Mongo, learned counsel, who was assigned to represent the appellant prayed, in terms of Rule 81 (1) of the Court of Appeal of Tanzania Rules, 2009, to add one ground of appeal. The respective ground of appeal is to the effect that during the summing up the learned trial judge did not direct assessors on vital points of law which were apparent in the case. Noteworthy, the appellant's counsel prayer was not resisted by Ms. Hellen Chuma, learned State Attorney, who appeared for the Respondent Republic. In this regard, we granted the appellant's counsel the requisite leave to add the new ground of appeal and argue it.

Submitting in respect of the ground of appeal on the propriety of the summing up to assessors, Mr. Mongo argued that upon going through the trial judge's summing up notes, it is evident that he did not direct

assessors on three vital points of law before he required them to give their opinions.

In his submission, firstly, the trial judge completely failed to explain to the assessors the meaning and importance of malice aforethought which is an important element in proving the offence of murder. He emphasized that though the trial judge at page 62 of the record of appeal towards the end of her summing up notes to assessors posed two issues; namely, whether the appellant was responsible for murdering the deceased and whether the alleged killing was committed with malice, she did not go further to direct assessors on context of this vital point of law. Secondly, though the appellant raised the defence of alibi at the initial stage of the trial, the same was not brought to the attention of assessors by the trial judge during the summing up. Surprisingly, he argued, the trial judge dealt with the defence of alibi in her judgment and dismissed it. Thirdly, though the record of proceedings in the record of appeal indicates that there was a contention that the appellant killed the deceased after he was provoked by his abusive language on the fateful day, yet the trial judge did not direct assessors on the defence of provocation. To the contrary, it was only raised in the judgment as reflected at pages 79 and 80 of the record of appeal, but was not fully dealt with.

On account of the pointed out omission, Mr. Mongo submitted that the trial court's proceedings are a nullity as injustice was occasioned to the appellant. To this end, he stated that as the omission is fatal, the entire proceedings of the trial court should be nullified, the appellant's conviction quashed and sentence set aside. As to the way forward, Mr. Mongo energetically submitted that in the circumstances of the facts in this case, a retrial should be ordered before another judge and with a separate set of assessors.

In support of his submission on the importance of summing up to assessors on vital points of law, the propriety of the proceedings before us and the consequences which should follow, he referred us to the unreported decision of the Court in **Bakari Selemani @ Binyo v. The Republic,** Criminal Appeal No. 12 of 2019 at page 7. In the end, on the strength of his submission, he pressed us to allow this ground of appeal.

In reply to the appellant's counsel submission on this ground of appeal, Ms. Chuma entirely agreed that there was non- direction to assessors on vital points of law by the trial judge. Similarly, she conceded that the omission is fatal rendering the trial court's proceedings a nullity. To this end, relying on the unreported decision of this Court in **Mathayo Wilfred and Two Others v. The Republic**, Criminal Appeal No. 294 of

2016 at page 6, she joined hands with her learned friend for the appellant to pray that the trial court's proceeding be nullified, conviction quashed and sentence set aside. Equally important, she unreservedly conceded that a retrial will be in the interest of justice in the circumstances of this case.

On our part, we wish to preface our deliberation on this ground of appeal by emphasizing that participation of assessors in homicide proceedings before the subordinate courts is patently regulated by the provisions of section 265 of the Criminal Procedure Act, Cap 20 R.E. 2019 (the CPA). On the other hand, full participation of assessors is further secured by the provisions of section 298(1) of the CPA. The said provision requires trial judges at the conclusion of the hearing of the evidence for both sides to sum up the case adequately to the assessors on the facts in relation to the law. Arguably, a close reading of the provisions of section 298(1) indicates that summing up is not mandatory. However, there are plethora of the decisions of the Court on the settled position that failure to comply with the said provision is fatal. Therefore, as rightly submitted by the counsel for the parties', in the instant case failure to sum up the case to assessors on facts and vital points of law is fatal rendering the entire proceedings a nullity. One among those authorities is the decision

in **Said Idd Mshangama @ Senga v. The Republic,** Criminal Appeal No. 8 of 2014 (unreported). Particularly, it was held that:-

> ""*...As provided under the law, a trial of murder before the High Court must be with the aid of assessors. One of the basic procedure is that the trial judge must adequately sum up to the said assessors before recording their opinions. Where there is inadequate summing up, non-direction or misdirection on such vital point of law to assessors, it is deemed to be a trial without the aid of assessors and renders the trial a nullity (see* ***Rashid Ally v. The Republic,*** *Criminal Appeal No. 279 of 2010-unreported)".*
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> [See also **Khamis Nassoro v. S. M. Z** [2005] TLR 228 and **Hatibu Gandhi v. The Republic** [1996] TLR 12 and **Masolwa Samwel v. The Republic**, Criminal Appeal No.266 of 2014 (unreported)]

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...*"

Applying the settled position of the law to the circumstances of this case, we have no doubt to state that the trial judge, with respect, completely failed to comply with the requirement of the law stated above. We have thoroughly perused the summing up notes to the assessors in the record of appeal, and it is evident that the summing up was not properly conducted. Notably, apart from summarizing the facts of the case and requiring the assessors to give their opinions, the trial judge did not at all direct assessors on vital points of law, namely, malice aforethought, defence of alibi and provocation. She only raised the issue of malice aforethought without further explanation of its ingredients. We, therefore, entirely agree with counsel for the parties that the omission of the trial judge is fatal as the trial is taken to have been conducted without the aid of assessors. The proceedings of the trial court thus cannot escape the wrath of being nullified. Consequently, we allow this particular ground of appeal.

Noteworthy, as this ground suffices to dispose of this appeal, we do not see the need of considering the remaining grounds of appeal. We therefore, have no hesitation to declare the trial court's proceedings a nullity. In this regard, we nullify the proceedings, quash conviction and set aside the sentence.

On the other hand, being mindful of the concurrent submissions of the learned counsel for the parties, we entirely agree that a retrial is in the best interest of justice in the circumstances of this case.

In the result, we order that the appellant be retried expeditiously before another judge and with a new set of assessors. Meanwhile, the appellant should remain in custody pending a retrial.

Order accordingly.

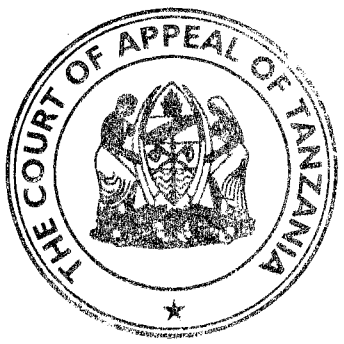
DATED at **IRINGA** this 30th day of April, 2021.

I. H. JUMA
CHIEF JUSTICE

F. L. K. WAMBALI
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

The judgment 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