IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: LILA, J.A., MWANDAMBO, J.A. And KEREFU, J.A.)

CRIMINAL APPEAL NO. 21 OF 2019

PETER CHARLES MAKUPILA @ ASKOFU.....APPELLANT
VERSUS
THE REPUBLIC..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Dar es Salaam)

(Rumanyika, J.)

Dated the 12th day of December, 2018
In
HC. Criminal Sessions No. 70 of 2017

.....

JUDGMENT OF THE COURT

23rd April & 12th May, 2021

LILA, JA:

The High Court of Tanzania sitting at Dar es Salaam convicted and sentenced the appellant Peter Charles Makupila @ Askofu to suffer death by hanging upon being satisfied that he murdered one Mohamed Mrisho Rashid at Bago area within Bagamoyo District in Coast Region on 13/10/2013. Aggrieved by the finding and sentence, he has come to this Court on appeal.

The prosecution evidence relied on to convict the appellant came from six witnesses and was that the deceased was a taxi driver driving a motor vehicle Registration No. T426 BUT Toyota Avensis the property of one Muhsin Ramadhani Mgoname. He possessed a driving licence No. 4000321669. On 13/10/2013, the appellant and his friend one John pretending to be customers, hired him for ferrying them to Kiwangwa area. On their way back and at Bago area, the two turned against him as the appellant seized the opportunity to cut his throat, took him off the car and dumped his body besides the road. The appellant and his friend left with the car but their mission was uncompleted. As the luck would have it, they met an accident at Msata area. Anton Steven (PW1) who lived at Msata near where the car overturned, went to rescue those involved in the accident only to find the appellant alone with clothes and the car seats stained with blood. In the said car there was also a blood stained knife and a driving licence bearing the name of Mrisho Lubarati. John survived the accident and he escaped. PW1 became suspicious and prudence had it that he should report the matter to the police. He therefore reported the matter to one Munzar of Wami police station. The two (PW1 and Munzar), were led by the appellant to where the deceased's body was laid. The body

looked slaughtered and there was also another knife. Dr. Peter Phisso (PW3) confirmed the death of the deceased and established the cause to be severe haemorrhage shock and filled a post-mortem report (exhibit P2). A policeman one E 3987 CPL Yohana (PW5) visited the scene of crime whereat he found a knife, drew the sketch map and recorded the appellant's cautioned statement (exhibit P4).

Namsi Elisante Ntimbwa (PW4), a Primary Court magistrate stationed at Mwambao Primary Court recorded the appellant's extra-judicial statement (exhibit P3). In an attempt to establish the appellant's involvement in the murder, his mouth swab, blood on the knife and clothes were sent to the Government Chemist and DNA test was conducted by Fidelis Segumba (PW6) and the reports thereof (exhibits P5, P6, P7, P8 and P9) were to the effect that the appellant's blood matched with the deceased blood contained in the knife and clothes.

Disassociating himself with the murder charge, the appellant who happened to be the sole defence witness vehemently denied killing the deceased. He contended that on the material date he was at Kiwangwa area looking for a farm for his friend one John Paulo. That on their way back to Chalince they boarded a car driven by the deceased and he was

driving at a very high speed, the car lost track and overturned as a result of which he sustained back injuries and became uconsciousness. He, further, stated that he was later interrogated by police and he explained what happened but did not confess. As regards his extra judicial statement before the justice of peace, he claimed that he was forced to sign it by the policemen.

The appellant's evidence tending to exonerate him from the accusation did not find purchase with the learned trial judge who found it highly implausible. In its stead, he was highly moved by the prosecution case and proceeded to convict and sentence the appellant as aforesaid.

Dissatisfied, the appellant is before us challenging the High Court finding conviction and sentence. We shall not recite the grounds of appeal for a reason to be detailed at a later stage of this judgment. Suffice to say that he filed a substantive memorandum of appeal containing five grounds which was subsequently followed by two supplementary memoranda of appeal comprising four grounds each.

The appellant who appeared in person in Court was represented by Dr. Chacha Bhoke Murungu, learned advocate. On the other side, Ms.

Esther Martin and Ms. Ashura Mnzava, learned State Attorneys, appeared for the respondent Republic.

At the commencement of his elaboration of the grounds of appeal, Dr. Murungu was very selective of the grounds to elaborate. He dropped all grounds except grounds 2 and 4 of appeal in the substantive memorandum of appeal. They essentially touch on the evidence of PW1 and PW6 being taken contrary to section 289 of the Criminal Procedure Act, Cap. 20 R. E. 2002 (the CPA) and exhibits P3 and P4 were improperly acted upon for not being read out after being cleared for admission as exhibits, respectively. On supplementary memorandum of appeal lodged on 9/9/2020, he chose to submit on grounds 1 and 4 of appeal concerning the trial court acting on the extra-judicial statement which was not signed by the appellant to signify acceptance of what was recorded and the cautioned statement not bearing the time the interview ended, respectively. He abandoned the rest of the grounds of appeal. He abandoned the whole of the memorandum of appeal lodged on 2/2/2021. He ended up remaining with substantially three grounds of appeal to submit on. These are: -

1. That, the evidence of PW1 and PW6 was taken in violation of section 289 of the CPA.
2. That, the cautioned statement (exhibits P3) and extra-judicial statement (exhibit P4) were wrongly relied on to ground the appellant's conviction.
3. That, the extra-judicial statement (exhibit P4) was not signed in contravention of the requirements of the Chief Justice's Guidelines.
4. That, there was no involvement of the assessors in the trial.

Amplifying ground 1 of appeal, Dr. Murungu argued that PW1 and PW6 were not listed as witnesses intended to be summoned by the respondent during trial and that the substance of their statements were not read out during committal proceedings. For that reason, they were not competent to testify unless the respondent had complied with the requirements of section 289(1) of the CPA which requires a notice to add a witness and the substance of such witness be brought to the attention of the accused. That was not done, Dr. Murungu insisted, hence disqualifying them from giving evidence during such trial. The trial court was at fault to receive such evidence and subsequently act on it to convict the appellant, he concluded. He urged the Court to expunge from the record not only

their respective evidence but also the exhibits tendered by PW6 (exhibits P5, P6, P7, P8 and P9).

A complaint by Dr. Murungu touching on the validity of the cautioned statement in ground 2 of appeal was withdrawn upon record explicitly indicating that it was read out after admission as exhibit and the time the interview ended being conspicuously indicated in it. Arguing in respect of the remaining limb, Dr. Murungu submitted that there was no indication in the extra-judicial statement that it was read out to the appellant by the one who recorded it and was signed by the appellant. Attacking it on another angle, he submitted that it was recorded after three days of the appellant's arrest which raises suspicious on its voluntariness. He could, however, not support his contentions with any law or Court's decision on which he relied other than simply insisting that the Chief Justices Guide provides for those requirements. He pressed us to expunge it from the record.

In elaborating ground 4 of appeal, the learned advocate centred on insufficient summing up to assessors. While referring to pages 85 to 88 of the record, he faulted the learned judge for failure to appraise the assessors on vital points of law such as ingredients of the offence of murder that is malice aforethought that featured in the trial to enable them

give an informed opinion. He argued that in terms of section 265 and 298(1) of the CPA, all trials before the High Court must be with the aid of assessors, failure by the learned judge to properly sum up the case to the assessors vitiated the trial. In augmenting his assertion, he referred to the case of **Lubinza Mabula and 2 Others vs Republic**, Criminal Appeal No. 226 of 2016 (unreported).

Upon the Court's prompting whether or not there was selection of assessors and their duty explained before the hearing commenced to the earnest, Dr. Murungu had no difficulty in responding that referring to page 74 of the record, neither the names of the assessors nor their roles in the trial indicated to have been done although three assessors featured during the time for them to put up questions to PW1.

The way forward after the nullification of the trial seemed to pose no problem to the learned advocate. It was his view that upon the extra-judicial statement and evidence by PW1 and PW6 being expunged from the record, no other cogent evidence remains linking the appellant with the commission of the offence. He pointed out other weaknesses in the prosecution evidence to be **one**; that after expunging PW1's evidence the record remains dead silent on how the information of murder and scene of

crime reached the police, **two**; that the sketch map of the scene of crime is unreliable on the ground that while the incident occurred on 13/10/2013, it was drawn on 13/10/2014, a year after the incident and **three**; that even the provisions of law cited by the learned judge were different in that while the charge indicated that the appellant was charged with murder contrary to section 195 of the Penal Code, his conviction was pegged under section 196 and 197 of the Penal Code. Given existence of the above weaknesses, he urged the Court not to order a re-trial as it will afford an opportunity to the prosecution to cure the anomalies and weaknesses in the evidence.

For her part, Ms. Martin had no qualm with the pointed out procedural infractions that obtained in the trial and the resultant consequences. She therefore had no problem with the trial being nullified. Her point of departure with her learned friend for the appellant is on the way forward. She vehemently pressed for an order of re-trial being made. She contended that there is sufficient evidence on which the appellant's conviction can be founded. She gave these reasons; **one**; that the evidence of PW1 should not be completely discounted on the ground that one Anton Makuka who was listed as a witness during committal

proceeding is the same as Anthon Steven (PW1) because the substance of the evidence given and place of domicile, Msata, are the same. **Two**; that as opposed to cautioned statements, time for recording the extra-judicial statement, the need for it to be read out to the appellant and the appellant to sign it are not stated as necessary requirements under the Chief Justice Guide for it to be valid. **Three**; that the variance on the year in the sketch map was a mere slip of the pen which is a normal human error. And, **four**; that since there is no problem with the cautioned statement and the extra-judicial statement which are best evidence from the appellant himself, then such evidence is sufficient to found a conviction. Reference was made to our decision in the case of **Jacob Asegelile Kanune vs Republic**, Criminal Appeal No. 178 of 2017 (unreported). In conclusion, she asked us to order the case be tried *de novo*.

Dr. Murungu had nothing new in rejoinder. He just reiterated his earlier submission and prayers.

We have given a deserving weight to the arguments by the learned counsel for the parties. As demonstrated above, they have no quarrel with the procedural infractions apparent on the record and the inescapable

wrath that fall on them. We hasten to point out that we entirely agree with them. We shall demonstrate our reasons.

First of all, we shall deal with the validity or otherwise of the testimonies by PW1 and PW6. It is not an issue that PW6 was not listed during committal proceedings to be among the prosecution witnesses at the trial. So, his evidence was wrongly received. As for PW1, the learned State Attorney has invited us to treat Anton Makuka of Msata Bagamoyo named in the committal proceedings to be the same as Anthon Steven who also introduced himself to be staying at Msata Bagamoyo when he gave evidence on 29/11/2018. Much as we may agree with her that they are from Msata Bagamoyo, the names, on the face of it, are completely different. After all, this was a matter to be resolved by the prosecution during trial not now. We accordingly decline the invitation. That said, it is trite law that no witness whose statement or substance of evidence was not read at the committal proceedings shall be called by the prosecution at the trial unless a reasonable notice in writing is issued to the defence side of its intention to do so. The provisions of sections 246(2) and 289(1), (2) and (3) of the CPA are all to that effect. The Court had an occasion to consider an identical matter in the case of **Jumanne Mohamed and 3**

Others vs Republic, Criminal Appeal No. 534 of 2015 (unreported) and stated that: -

> *"We are satisfied that PW9 was not among the prosecution witnesses whose statements were read to the appeliants during committal proceedings. Neither could we find a notice in writing by the prosecution to have him called as an additional witness. His evidence was thus taken in contravention of section 289(1)(2) and (3) of the Act...In case where evidence of such person is taken as is the case herein, such evidence is liable to be expunged ...We accordingly expunge the evidence of PW9 including exhibits P6 and P7 from the record."*

The situation in the above case is in all fours with the instant one. By analogy, we therefore hold that the evidence by PW1 and PW6 were taken contrary to the law. We accordingly expunge their respective evidence and exhibits P5, P6, P7, P8 and P9 which were tendered by PW6 from the record.

We propose to, first, deal with the appellant's complaint in ground 4 of appeal and later the complaint in ground 3 of appeal. A resolve to this

ground will make it easy for us when determining ground 3 of appeal. Here we are being asked to consider whether or not the extra-judicial statement (exhibit P4) was recorded according to the Chief Justice's instructions contained in '**a Guide for Justices of Peace**" (the Guide). Central to this complaint is that it was not read over to the maker (appellant) and he did not sign it. Just to serve as a background of it, the Guide which was promulgated by the Chief Justice acting under the authority of section 56(2) of then Magistrates' Court Act, 1963 Cap. 537 which is *pari materia* with section 62(2) of the current Magistrates' Courts Act, Cap. 11 R. E. 2002 (the MCA) came into operation on 1/7/1964 and when the MCA was repealed it was served by section 72(3) of the current MCA and it became part of our laws. As regards the significance of the instructions contained in the Guide, the Court in **Japhet Thadei Msigwa v Republic**, Criminal Appeal No. 367 of 2008 (unreported) stated that: -

> *"So, when Justices of the Peace are recording confessions of persons in custody of the police, they must follow the Chief Justice's Instructions to the letter. The section is couched in mandatory terms."*

The Court went on to state: -

"We think the need to observe the Chief Justices instructions are two-fold. One, if the suspect decided to give such statement, he should be aware of the implications involved. Two, it will enable the trial court to know the surrounding circumstances under which the statement was taken and decide whether or not it was given voluntarily."

We are unable to reproduce the whole Guide, but of important, Justices of the Peace are enjoined to ensure the following details from the accused persons are reflected when recording confessions which in legal arena is termed as extra-judicial statement: -

(i) The time and date of his arrest.

(ii) The place he was arrested.

(iii) The place he slept before the date he was brought to him.

(iv) Whether any person by threat or promise or violence he has persuaded him to give the statement

(v) Whether he really wishes to make the statement on his own free will.

(vi) That if he makes a statement, the same may be used as evidence against him."

For avoidance of doubt, we have taken pain to recite Regulation 6 of the Guide which is relevant to our case which shows the form showing the steps to be followed by the Justice of the Peace when recording extra-judicial statement. The form is of this nature: -

*"6. **Special Powers of Justices ...***

S. 51 (A) A Justice assigned to a District Court- house M.C.A. may take and record the confessions of person in the custody of the police.

A prisoner wishing to make a statement may be brought to the office of a justice under police escort and usually bearing a letter from the Officer-in-charge, Police, to the effect that the accused, who is under arrest in connection with alleged offence, wishes to make a voluntary statement to a magistrate/ Justice.

On every such occasion, a Justice should take following action, which should be recorded on foolscap paper:

In the District Court of.....

At .....

Justice of the peace assigned to this District Court.

(1). The Prisoner .....is brought to me in police Custody at.....o'clock on..... (date).

(2) I am informed by the police that the prisoner is accused of .....and wishes to have a statement recorded.

(3) The prisoner is placed in the custody of .....

and the police are directed to leave the premises. I am satisfied that there is no police officer in this office nor in any place where these proceedings can be seen or heard.

(4) .....duly affirmed as interpreter between.....and.....

Note. It will often be convenient to use the messenger guarding the prisoner as the interpreter. Unless the Justice speaks fluently the language of the prisoner, an interpreter who does so shouid be used.

(5) The prisoner is informed that be is before a Justice and asked if he wishes to say anything. He replies, "Yes" I wish

to say something" (if the prisoner replies "No" he should be returned at once to police custody).

(6) I have, with the consent of the prisoner, examined his body. The result of my examination is as follows: -

.....

.....

Note: The record should state whether any marks, bruises, cut are noted and whether they appear to be old or recently caused.

(7). The Justice should now ask the prisoner the following question and record his replies thereto:

Q.- On what day and at what time were you arrested by the police?

A.-

Q.- At what place where you arrested?

A.-

Q.- After you were arrested where were you taken by the police and where did you sleep until you were brought here before me?

A.-

(8) The Justice must now explain to the prisoner that he

is free to Make a statement or not, as he pleases, and is free to Make a statement or not, as he pleases, and should next ask the prisoner the following questions and record his replies thereto: -

Q.- Has any person by any threat or by any promise or by any Violence towards you persuaded you to come here to make a statement before me?

A.-

Q.- Do you really wish to make a statement to me of your own free will?

A.-

Q.- You understand that if you make a statement, it Will be recorded and may be used as evidence Later when you brought to trial.

A.-

I have questioned the prisoner and after careful consideration of his replies, I am satisfied that he is a free agent and the statement he makes is a voluntary one and that he has not been forced to make it by threats of any other means.

Signed.....

Justice

Date.....

(9) The Prisoner is asked: "Do you wish to make a statement"? Reply:

"Yes I wish to say.....

.....

.....

(the exact words of the prisoner must be recorded)

.....

(Signature or R.T.M. of prisoner)

I believe that this statement was voluntarily made. It was taken down in my presence and hearing and was read over to the prisoner making it and agreed by him to be correct and it contains a full and true record of the statement made by him.

Signed.....

Justice

Date.....

(Signature of Interpreter, if used) .....

Date.....

Note: Once the prisoner starts to make his statement, the Justice should not intervene in any way until he has finished: The Justice when recording the statement of the

prisoner must not ask any question except where essential for the sake of clarification: "I was at a 'beer drink: deceased and All were there. They shouted at me. He then hit me with his beer mug". The Justice could properly ask the prisoner "he" was.

(10) The accused is returned to police custody:

Signed.....
Justice

Date.....

Note: The recorded statement should be given as soon as possible to the Court Clerk of the District Court.

It is appreciated that the procedure in taking a confession is a lengthy one: the Justice will have much to write down. This is essential so that the record may show conclusively that the statement made was really a voluntary one.

Some District Courts will have cyclostyled forms including paragraph 2, 3, 5 ,6, 7 and 8: this will save time in writing, but if used must be carefully complied with by justices."

The Kiswahili version of the form, which was used by the magistrate in recording the appellant's statement in this case, appears like this:-

"HATI YA UNGAMO

Katika Mahakama ya Mwanzo Mahali.....

Mbele ya .....

1. *Mahabusu.....mbele yangu akiwa Chini ya ulinzi wa askari wa Usalama.....wakati wa saa.....*
   Tarehe.....
2. *Nimearifiwa na askari Usalama.....kwamba mahabusu.....*
   Na kwamba anataka ushahidi wake unakiliwe au uandikwe.
3. *Mahabusu.....Amewekwa katika ulinzi wa.....usalama.....*
   Ameamuriwa kuondoka katika chumba. Na kwamba nimeridhika kwamba hakuna askari wa usalama katika chumba anamo andikishwa ushahidi au mahaii popote ambamo ushahidi huu unaweza kusikilizwa na kuonwa.
4. *Mkalimani.....*
5. *Mahabusu ameamuriwa kwamba yuko mbele ya.....na ameulizwa kama anataka kusema neno loiote.*
   Mahabusu.....Ajibu.....

6. *Kwa ridhaa yake mahabusu.....Nimemkagua mwili wake. Matokeo ya Ukaguzi wangu ni kama ifutavyo:-*
   .....
7. *Mahabusu ameulizwa maswali yafuatayo na majibu yake yamenakilishwa kama ifuatavyo: -*
   Swaii: Ni siku gani ba wakati gani ulipokamatwa na askari wa usalama
   Jibu
   .....
   Swaii: Ni mahaii gani ulipokamatwa na askari wa usalama?
   Jibu:.....

Swali: Baada ya kukamwatwa ulipelekwa wapi na askari na wapi ulikolala mpaka ulipoletwa mbele yangu?
Jibu:.....

8. *Mahabusu.....*

Nimeeiezwa Kwamba yuko mbele yangu akiwa.....

Anataka

Swali: Je, kuna mtu yoyote kwa njia ya vitisho, kwa ahadi au kwa mashambulio ya namna yoyote Kwako anafanya uje hapa na kueleza ushahidi wako mbele yangu?

Jibu:
.....

Swali: Je, kwa dhati yako unataka kueleza ushahidi wako mbele yangu kwa

Matakwa yako mwenyewe?

Jibu:
.....

Swali: Unafahamu kwamba kama ukiandikisha ushahidi wako mbele yangu

utaandika na kwamba Unaweza kutumika kama ushahidi baadaye utapokeiewa kwa kusikilizwa shauri lako.

Jibu:
.....

Nimemuuliza mahabusu maswali niliyoorodhesha hapo juu na baada ya kutafakari kwa makini majibu yake nimeridhika kwamba mahabusu yu huru na kwamba maelezo yake ambayo anayatoa ni ya hiari yake na kwamba hakulazimishwa kueleza lolote kwa njia za vitisho au kwa njia nyingine yeyote.

Imetiwa sahahi: .....

Tarehe:

.....

9. Mahabusu anaulizwa (Je unataka kueleza ushahidi wako?)

Jibu: ndiyo nataka

Kusema:.....

(Andika maneno anayotamka mshitakiwa) Akimaliza

SAHIHI YA MSHITAKIWA**.....**

.....

DOLE GUMBA LA MKONO

Naamini maneno haya yametolewa kwa hiari. Yametolewa na kuandikwa mbele yangu nimesomewa mshitakiwa ambayo anakubali ni maandishi sahihi ya maelezo aliyoyatoa.

SAHIHI.....

MLINZI WA AMANI

TAREHE.....

SAHIHI:.....

YA MKALIMANI (KAMA ALITUMIKA)

10. Mshitakiwa anarudishwa katika ulinzi wa polisi.

SAHIHI:**.....**

MLINZI WA AMANI

TAREHE**.....*"*

It is clear from the above form that the person or suspect who wishes to make his statement has to commit himself over his readiness to voluntarily make his statement and thereafter sign. Then, the statement is recorded by the Justice of the Peace who signs after completing it. Nowhere else is the suspect required to sign the statement. In addition, as opposed to cautioned statements, there is no requirement that the statement should be read to the suspect after its completion. Instead, it is the justice of the Peace who is obligated to sign at the end of the statement. Even the time the recording starts and ends need not be shown.

We have examined the appellant's extra-judicial statement (exhibit P4) and it is plain that the same kiswahili form was used in recording the appellant's statement. The justice of the Peace (PW5) signed in the relevant parts. But what is apparent in exhibit P4 is that the appellant signed immediately after his statement. Such was a good invention by PW5 so as to dispel any complaints on the voluntariness during the recording of the statement. The appellant's complaint is therefore without any basis.

We now turn to consider the appellant's complaint in ground 3, It is about the extra-judicial statement (exhibit P4) being taken after three days. Dr. Murungu argued that it was supposed to be taken within four hours after the appellant's arrest as is the case with cautioned statement. He relied on section 50(1) of the CPA. On the rival side, Ms. Martin had it that no time is set by the Guide as the time for recording extra-judicial statement only that it should be taken within reasonable time

Following our determination of ground 4 of appeal above, we think we should not be detained much on this complaint. The Guide does not provide for the time within which extra-judicial statement should be recorded and ended. Further to that, section 50(1) of the CPA does not apply in recording extra-judicial statements. That provision is very clear that it applies in recording cautioned statements of suspects who are under police restraint only. Had the legislature intended its applicability to be extended to that extent, it would have categorically stated so. It is for that reason that the Court, in the case of **Joseph Stephen Kimaro and Another vs Republic**, Criminal Appeal No. 340 of 2015 (unreported) cited in **Andius George Songoloka and 2 Others vs The DPP**, Criminal

Appeal No. 373 of 2017 (unreported), drew a distinction between the two statements in these unambiguous words: -

> *"In other words, unlike caution statements whose time to be recorded is prescribed under section 50 and 51 of the CPA, no such limitation is imposed in extra-judicial statements, recorded before Justices of the Peace whose concern is to make sure that an accused person before him is a free agent and is not under fear, threat or promise when recording his statement."*

In the light of the above holding, there is no statutory time limit set within which extra-judicial statement should be recorded. It can be taken at any time but within reasonable time after the accused has expressed his willingness to make such confession. (see also **Mashimba Doto @ Lububanija vs Republic**, Criminal (2016) TLS R 388 and **Vicent Ilomo and Another vs Republic**, Criminal Appeal No. 337 of 2017 (unreported). On this basis, the appellant's complaint is unfounded. It is dismissed.

Whether the trial was with the aid of assessors is our last ground of appeal to determine. Yet again, counsel for the parties shared views on this aspect that the involvement of assessors is wanting both in selection

and summing up notice. We shall address this complaint under two headlines. **One;** whether there was selection of assessors, was the accused afforded the right to object to their selection and whether the role they had to play in the trial was fully explained to them before the hearing commenced. **Two;** whether the summing up notes were adequate.

Before we proceed further we wish to make the following observation. Section 265 of the CPA, puts it clear that it is mandatory that all trials before the High Court be conducted with the aid of assessors. Further, the provisions of section 298(1) of the CPA requires the trial judge upon conclusion of reception of evidence from the prosecution and the defence to sum up the evidence of both sides and invite the assessors to give their opinion which should also be recorded. Although the word used is "may", which may be taken to mean that it is not mandatory, but given its purpose to assessors, this Court has consistently taken it to be a long rooted practice such that it is now necessary to do so (see **Hatibu Gandhi and Others vs R** [1996] TLR 12, **Khamisi Nassoro Shomari vs SMZ [2005]** TLR 12 and **Mulokozi Anatory vs Republic**, Criminal Appeal No. 2014 (unreported). The purpose of summing up to assessors is to enable the assessors to arrive at a correct opinion hence assist the trial court to

arrive at a just decision. That can be achieved only where the learned trial judge, in the summing up notes, touches on all essential facts and elements of the offence charged in relation to the applicable law. Involvement of assessors begins with their appointment, explanation of their duty in the trial and the accused being accorded opportunity to comment on the suitability of the assessors to preside over his case before the hearing commences.

Appointment or selection of assessors, in terms of section 285(1) of the CPA, is the duty of the trial court. Thereafter, to ensure justice is done, the accused is given opportunity to comment on their suitability. The reason for abiding to this procedure was elaborately stated in the unreported Criminal Appeal No. 176 of 1993 - **Laurent Salu and Five Others vs. The Republic,** cited in **Chacha Matiko @ Magige vs Republic**, Criminal Appeal No. 562 of 2015 (unreported) that: -

> *"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 criminal justice in this country.*

The rationale for that rule is fairly apparent. The rule is designed to ensure that the accused person has a fair hearing. For instance, the accused person in a given case may have a good reason for thinking that a certain assessor may not deal with his case fairly and justly because of, say, a grudge, misunderstanding, dispute or other personal differences that exist between him and the assessor. In such circumstances in order to ensure impartiality and fair piay it is imperative that the particular assessor does not proceed to hear the case; if he does then, in the eyes of the accused person at least, justice will not be seen to be done. But the accused person, being layman in the majority of cases, may not know of his right to object to an assessor. Thus in order to ensure a fair trial and to make the accused person have confidence that he is having a fair trial, it is of vital importance that he is informed of the existence of this right. The duty to so inform him is on the trial judge, but if the judge overlooks this, counsel who are the officers of the court have equally a duty to remind him of it.

In the instant case, it is not known if any of the accused persons had any objection to any of the

assessors, and to the extent that they were not given opportunity to exercise that right, that clearly amounts to an irregularity."

In our instant case, the record is dead silent on the appointment of assessors and the appellant being accorded an opportunity to exercise his right to object or comment on the suitability of the appointed assessors before participating in the case. That omission, certainly, denied the appellant the right to ensure that his case was tried by a fair and impartial court. In addition, there is no indication that the assessors were informed of their role in the trial. We accordingly agree with the learned counsel that these irregularities were fatal and on the authorities above cited, they vitiated the trial. The appellant was accordingly unfairly tried with the effect that it occasioned a failure of justice. [see also **Khamis Abdul Wahab Mahmoud vs Republic**, Criminal Appeal No. 496 of 2017 and **Monde Chibunde @ Ndishi vs Republic**, Criminal Appeal No. 328 of 2017 (both unreported)].

Both counsels were also agreed that the summing up notes were deficient. It fell short of explaining the ingredients of the offence of murder

such as malice aforethought. As we have shown above, where the trial is with the aid of assessors, the trial court is enjoined to sum up the case to the assessors and invite them to give their opinion which should be recorded. This is aimed at enabling them to give meaningful opinions. (see **Said Mshangama @ Senga vs Republic**, Criminal Appeal No. 8 of 2014 and **Masolwa Salum vs Republic**, Criminal Appeal No. 206 of 2014 (both unreported).

We have considered the summing up notes as reflected at pages 85 to 88 and the learned judge's judgment as reflected at pages 119 to 124 of the record so as to see whether the summing notes sufficiently informed the assessors the facts of the case, ingredients of the offence charged in relation to the law applicable. It is vivid that, in the summing up notes the learned judge explained to the assessors the accusation of murder laid at the appellant's door and that the duty to prove the charge lay on the prosecution. He also warned them not to be influenced with extraneous matters like promises, threats or sympathy. He then gave up the summary of evidence by both the prosecution and the defence. Finally, this is what he stated: -

"You may lady assessors now see that the prosecution case hinges on the accused's extra-judicial statements (exhibit P3) and the undisputed fact that the accused was the last person being with the deceased in which case the latter was bound to give a sufficient account, else to be held responsible for the murder. If you are convinced that the accused and deceased were involved in an accident and probably out of it the deceased lost his life opine accordingly. If you are of the opinion that accused is the responsible murderer or not at all criminally liable, please opine.

I am obliged. You are accordingly guided."

Based on the above summing up notes, all the assessors returned a verdict of guilty to the murder.

However, in the judgment, it is evident that the learned trial judge applied the doctrine of recent possession, extra-judicial statement and the DNA analysis to convict the appellant which matters were not only not explained to the assessors but also their legal implications in the summing up notes not indicated. More seriously, before giving their opinions, the assessors were not told the crucial elements of the offence of murder particularly malice aforethought and how it is established. These were vital

points which the assessors were not informed of. In the circumstances they were disabled to give rational and focused opinions. The consequences were explained by the Court in **Tulubuzya Bituro vs Republic** [1982] TLR 264 that: -

> *"...in a criminal trial in the High Court where assessors are misdirected on a vital point, such trial cannot be construed to be a trial with the aid of assessors. The position would be the same where there is non-direction to the assessors on a vital point..."*

Given the pointed out deficiencies in the summing up, we are satisfied and accordingly agree with the counsel of the parties that the appellant's it cannot not be said that the assessors were fully involved in the appellant's trial as imperatively envisaged under section 265 of the CPA. The Court has consistently held such infraction to be fatal and vitiate the trial. For instance, in the case of **Abdallah Bazaniye and Others vs Republic** [1990] TLR 42, the Court stated that: -

> *"...We think that the assessor's full involvement as explained above is an essential part of the process that its omission is fatal, and renders the trial a nullity."*

What should follow after the trial is nullified is an issue on which the learned counsel locked horns. May be we should let the factors to be considered guide us. In the often cited decision by the defunct East African Court of Appeal of **Fatehali Manji vs Republic** [1966] E. A. 341 it was stated that: -

> *"In general a retrial will be ordered only when the original trial was illegal or defective. It will not be ordered where conviction is set aside because of insufficiency or for purposes of enabling the prosecution to fill up gaps in its evidence at the first trial. Even where the conviction is vitiated by mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that, a retrial shall be ordered; each case must depend on its own facts and circumstances and an order of retrial should only be made when the interest of justice require."*

The Court, in the case of **Selina Yambi and Others vs Republic**, Criminal Appeal No. 94 of 2013 (unreported), adopted those factors and went on to state that: -

"We are alive to the principle 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 gaps. The bottom line is that; an order should only be made where the interest of justice require."

In both cases the bottom line is whether an order of re-trial will be just in the circumstances of each particular case. And, that such an order should not afford the prosecution opportunity to introduce other evidence (new evidence) not presented at the first trial so as salvage their otherwise weak case in order to secure a conviction.

Having in mind the above caution, we have considered the record and particularly the prosecution case. Plain as it is, no one witness claimed to have seen the appellant murder the deceased. The appellant's arrest was consequential to PW1 reporting the accident to the police. PW1's evidence, as shown above, was improperly taken and has been expunged from the record. What remained linking the appellant with the murder is the blood stains on his clothes and knife. Both the testimony of PW6 and the DNA analysis reports he tendered have been expunged from the record. We are mindful of the fact that we have made a finding that both

the appellant's cautioned statement and extra-judicial statement could not be faulted, hence retained them. We also appreciate the learned State Attorney's argument that the two statements being best evidence from the appellant and on which, alone, conviction can be grounded, but how sure are we or what guarantee is there that other evidence and even the anomalies in letting PW1 and PW6 testify contrary to sections 246(2) and 289(1), (2) and (3) of the CPA will not be rectified and the two be allowed to testify? Definitely there is none because a re-trial is in essence a fresh trial in which the prosecution is entitled to call as a witness any person irrespective of whether he had earlier on testified and his evidence expunged for whatever reason or introduce any other evidence so as to secure a conviction. After all, we are not certain whether or not the two statements standing alone may be sufficient evidence on which a conviction may be grounded as that would be a matter to be determined by the trial court. Our concern is based on whether or not the prosecution will not introduce into evidence new facts so as to fill up gaps in their case. As rightly argued by Dr. Murungu, the chances of the prosecution benefiting from the order for re-trial cannot be ruled out. That said, we are

inclined to agree with the learned advocate that this is not a fit case to order a re-trial.

For the reasons we have endeavoured to demonstrate, we allow the appeal, quash the appellant's conviction and set aside the sentence. We hereby proceed to order that he should be released from prison forthwith if not held therein for another lawful cause.

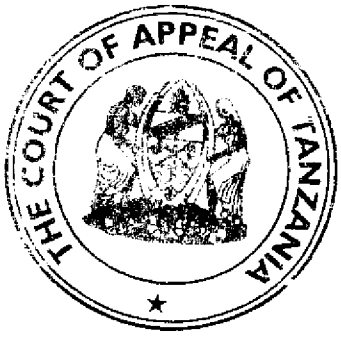
DATED at **DAR ES SALAAM** this 11th day of May, 2021.

S. A. LILA
JUSTICE OF APPEAL

L.J.S. MWANDAMBO
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

The Judgment delivered this 11th day of May, 2021 in the presence of Dr. Chacha Bhoke Mrungu, appeared for the Appellant and Ms. Daisy Makakala, learned State attorney for the Respondent is hereby certified as a true copy of the original.



D.R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL