

IN THE COURT OF APPEAL OF TANZANIA

AT TANGA

(CORAM: MUGASHA, J.A., KOROSSO, J.A And MWANDAMBO, J.A.)

CRIMINAL APPEAL NO. 108 OF 2020

ALLY SALIM DUDE..... APPELLANT

VERSUS

THE REPUBLICRESPONDENT

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

(Mkasimongwa, J.)

dated the 7th day of January, 2019

in

Criminal Session No. 15 of 2017

JUDGMENT OF THE COURT

25th May & 1st June, 2021

MUGASHA, J.A.:

The appellant and Johnson Josephat who was acquitted were both charged with the offence of murder contrary to section 196 of the Penal Code Cap 16 R.E 2002. It was alleged by the prosecution that, on 4/8/2015 at Corner Z Amboni area within the District, City and Region of Tanga, they murdered one Zuberi Juma @ Mbunda. They both pleaded not guilty and to prove its case, the prosecution lined up six witnesses and tendered three documentary exhibits namely: the deceased's statement (Exhibit P1), the

sketch map of the scene of crime (Exhibit P2) and the autopsy report of the deceased (Exhibit P3).

It was the prosecution account that, the deceased, the appellant and Johnson Josephat all resided at cross Z in Amboni area. On the fateful day, bandits stormed into the deceased's house and demanded to be given money. As the deceased declined to have any money, he was struck with bush knives and sustained injuries on the head and the face. Besides, the bandits stole the deceased's chicken and vanished. The deceased who was injured, managed to walk to the house of Waziri Mussa (PW1) and narrated the episode to him mentioning the appellant and his colleague to be the assailants. Thereafter, PW1 accompanied the deceased to Chumbageni Police Station where PF3 form was issued and the deceased was taken to Bombo Hospital where he was admitted and later succumbed to death. On the same night when the deceased was attacked, Hadi Mohamed Mwanamoyo (PW3) recounted to have heard about the fateful incident and prior to that, on the same day he had seen the appellant with a slaughtered chicken and that he disclosed to have stolen it from the deceased. Before the deceased succumbed to death, D. 9768 D/Sgt Shabani (PW2) recalled to have visited him on 5/8/2015 at the hospital and recorded his statement whereby he

mentioned the assailants. According to E.6958 D/Sgt Innocent (PW4) who visited the scene of crime, he drew a sketch map upon being assisted by Ally Mataruma who lived in the same village with the deceased.

In their defence, they both denied each and every detail of the prosecution accusations. The appellant claimed to have been informed about the fateful incident by his friends. He as well recalled to have been directed by the deceased's wife to guard the deceased's shamba which he obliged and on the following day, he was arrested and subsequently arraigned in court accused of having attacked and caused the death of the deceased. The other accused person, denied to know the residence of the appellant. He told the trial court that although he heard that the deceased was attacked by thugs and was hospitalised at Bombo, he opted not to visit him having heard what had befallen him.

After a full trial, the judge summed up the case to the assessors who all returned a verdict of guilty. Ultimately, the appellant was convicted and sentenced to suffer death by hanging. The other accused person was acquitted on ground that, the prosecution did not prove beyond reasonable doubt his involvement in the fateful incident when the deceased was attacked and later succumbed to death.

Aggrieved, the appellant has appealed to the Court raising a total of eleven grounds of complaint in the Memorandum of Appeal and the Supplementary Memorandum of Appeal. However, due to reasons to be apparent in due course we shall not reproduce all grounds of appeal except the second ground in the Supplementary Memorandum of Appeal which is to the following effect:

1. That the trial Judge/court made fatal irregularity for failure to address the issue of assessors summing up of evidence opinion to be done orally.

At the hearing, the appellant was represented by Mr. Christopher Wantoro, learned counsel whereas the respondent Republic had the services of Mr. Pius Hilla, learned Senior State Attorney assisted by Ms. Tussa Mwaihesya, learned State Attorney.

After a brief dialogue with the Court, we understood the gist of the complaint to be hinged on the two assessors who opted to support the opinion of the first assessor instead of giving distinct opinions. In addition, to the said ground of complaint, we required parties to address us on the propriety or otherwise of the summing up to assessors on account of their non-direction on the vital points to wit: the meaning and evidential value of

the dying declaration and the required standard of proof in the criminal charge which faced the appellant.

Upon being invited to address the Court, Mr. Wantoro submitted that while the two assessors did not give any opinion after the summing up, it was irregular for the learned trial Judge to act on their purported opinions to convict the appellant. On being probed by the Court and directed to refer to the record of appeal in that regard, he argued that, section 298 (1) of the Criminal Procedure Act [CAP 20 RE.2019] (the CPA), requires every assessor to give his or her own distinct opinion. Furthermore, the learned counsel submitted that, at the summing up the learned trial Judge did not direct the assessors on salient points of law and as such, the trial was thus not conducted with the aid of the assessors which offends the dictates of section 265 of the CPA. He argued this to have vitiated the trial and asked the Court to nullify the trial proceedings, quash and set aside the judgment, conviction and sentence. However, he submitted against a retrial order arguing that, the prosecution evidence on the record is not sufficient to prove the charge against the appellant.

On the other hand, although the learned State Attorney subscribed to what was submitted by the appellant's counsel on the non-direction of

assessors on vital points of law and that the trial was vitiated, he prayed for a retrial arguing that from what can be discerned on the record, the prosecution has a strong case against the appellant.

Having carefully considered the submissions of the learned counsel and the record before us, the issue for our determination is the propriety or otherwise of the summing up to the assessors and the way forward. While the learned counsel for either side were at one on the improper summing up to assessors on non-direction on the vital points of law, they parted ways on the propriety or otherwise of a retrial.

The provisions of section 265 of the Criminal Procedure Act, Cap 20 RE. 2019 (CPA), mandatorily requires that a criminal trial before the High Court must be conducted with the aid of assessors. In that regard, in terms of section 298 of the CPA, after the close of the case for the prosecution and that of the defence and require them to give their opinions. What transpired when the assessors were called upon to give their opinions is reflected at page 69 to 71 as follows:

"ASSESSORS OPINION:"

Miss Mariam Raymond Mbelwa (Assessor) My Lord in the case, the two accused persons stand charged of murder of Zuberi Juma Mbunda. The prosecution called four witness to testifies and the accused gave evidence on their own. It is not disputed that Zuberi Juma Mbunda is dead and that he died unnatural death. After considering the evidence on record I have the following questions in my mind:

1. Whether the Accused persons are the ones who attacked the deceased.
2. Whether the Accused came to the deceased's home on the fateful night.
3. Whether the deceased had properly identified the accused persons.
4. Whether the accused persons had intended to commit the offence.

In respect of the 1st question, there is no an eye witness who saw the accused persons attacking the deceased. The only evidence available is the statement of the deceased person made to PW1 and PW2 (Sgt Shabani). The later interviewed the deceased in Bombo Hospital where he was admitted from the wounds he had sustained. It is when he was told by the deceased that when he was sleeping in the night in question he was awakened by a bang and got up and came to the door with a torch lighting. It is when he saw and attacked assaulting him on different body parties: on the head and stepped on his stomach. The 2nd Accused person cut him on the frontal head/ (paji la uso) and a head (Kichwani). The 2nd Accused grabbed from the deceased a torch and machete he was possessing.

My Lord, this evidence is corroborated by the testimony of PW1, the first person approached by the deceased after the incidence. PW1 told the Court that he saw the deceased with blood covering his face and the deceased said that he was attacked by thugs and he mentioned the two accused persons in this case to be the ones who attacked him with machetes after he had identified them.

As for the second question, apart from the statement of the deceased telling that he was attacked by the two accused persons, PW3 told the Court that the 2nd Accused came to his place possessing a slaughtered hen and asked him to cook some food so that they eat. The 2nd Accused told PW3 that he took the chicken from the old Man he had earlier wanted him to go with to attack cutting him by machetes so that they reside in his compound. This evidence in my view shows clearly that the accused persons came to the deceased house.

In respect of the third question, that is whether the deceased did identify the suspects, the evidence shows that after he had heard the bang, that deceased lit a torch and proceeded to the place of the bang. It is when he saw and identified the 1st and 2nd Accused persons. The Accused persons did not deny knowing the deceased. The 1st Accused used to frequently pass through the deceased's compounds in his way to his work place. The 2nd Accused person had sometime worked with the deceased. So the accused and the deceased were knowing each other prior to that material night.

As regards to the fourth question: Whether there was malice on the part of the accused? My Lord, the 2nd Accused's act seducing the PW3 that they go cut the deceased so that they may live into the compound shows the

Accused had malice. They used machetes which are a sharp object in wounding the deceased. They used great force in attacking the deceased. The body parties where the blows were directed to, that is the forehead, head and abdomen were vulnerable one. They again caused large wounds to the deceased.

In my opinion, all accused persons are guilty of the offence of murder as they stand charged with. That is all.

Sgd: E. J. Mkasimongwa

Judge

17/12/2018

Mr. Mbwana Rashid (Assessors): *My Lord I have the same view as my colleague that the Accused persons are guilty of the offence they stand charged with. That is all.*

Sgd: E. J. Mkasimongwa

Judge

17/12/2018

Miss Batuli Mussa (Assessor): *My Lord I subscribe to all what is stated by my fellow Assessor. I find the accused guilty of the offence of murder as charged. That is all.*

E. J. Mkasimongwa

Judge

17/12/2018"

It can be discerned from the quoted passage that the two assessors adopted what was opined by the first assessor which is the gist of the appellant's complaint. The mode of delivery of opinion by assessors for the

purposes of giving judgment is regulated by the provisions of section 298 of the CPA which stipulates as follows:

"(1) 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 his 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.

(2) The judge shall then give judgment, but, in doing so, shall not be bound to conform to the opinions of the assessors.

(3) If the accused person is convicted, the judge shall pass sentence on him according to law.

(4) Nothing in this section shall be construed as prohibiting the assessors, or any of them, from retiring to consider their opinions if they so wish or, during any such retirement or at any time during the trial, from consultation with one another."

Looking at the dictates of the cited provision, apart from section 298 (1) of the CPA stating that each of the assessors is required to state his opinion orally as to the case generally, in terms of subsection (4), the assessors are not barred from consulting one another before giving their

opinions. Having gathered that the first assessor's opinion is reflective of their opinions, thus, the two assessors supported or subscribed to it. It is logical that they consulted one another which is not offensive and that is what made them to return a unanimous opinion on the guilt of the appellant. Therefore, we do not agree with Mr. Wantoro's suggestion that two assessors supporting the opinion of the other assessor was in contravention of the law.

Next is the non-direction of the assessors on vital points of law. It is settled law that, the opinion of assessors can be of great value and assistance to the trial judge if they fully understand the facts of the case before them in relation to the relevant law and if the law is explained to them and their attention is drawn to the salient facts of the case. Failure to do so renders the value of opinion of assessors correspondingly reduced. See - **WASHINGTON S/O ODINDO VS REPUBLIC** [1954] 21 EACA 392 and **ALLY JUMA MAWEPA VS REPUBLIC**, [1993] TLR 231.

The follow up question is whether the non-direction on the salient points of law did affect or influence the opinion of the assessors. Our answer is in the affirmative. In the matter under scrutiny, from pages 86 to 88 of the record, it is glaring that it was the finding of the learned trial Judge that, the

dying declaration cannot solely be acted upon to convict without being corroborated by other evidence. Ultimately, he concluded that, the dying declaration in which the deceased narrated how he was attacked by the assailants who also stole his chicken was corroborated by PW3 who on the material night saw the appellant possessing a chicken and he disclosed to have stolen it from the deceased. However, the assessors were not addressed on the meaning and the evidential value of the dying declaration. That apart, since it is settled law that in a criminal trial the prosecution is duty bound to prove a case beyond reasonable doubt, this crucial point of law was not brought to the attention of the assessors at the summing up. We found the omission irregular because what was acted upon by the learned trial Judge to ground the conviction was not earlier on explained or made known to the assessors to enable them to make informed or rather rational opinions. This offended the dictates of the provisions of section 265 of the CPA which requires a criminal trial to be conducted with the aid of assessors. We therefore agree with the learned counsel that, the infraction during the summing up vitiated the trial which had an adverse impact on the appellant who was not fairly tried.

In view of the stated infraction, while the learned State Attorney submitted that a retrial is worthy, the appellant's counsel submitted against such order arguing that the prosecution account on the record is weak. The criteria for ordering a retrial was stated by the Eastern African Court of Justice in the case of **FATEHALI MANJI VS REPUBLIC** [1966] 1 EA 343 held as follows:

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

[Emphasis supplied]

In the light of the bolded expression, we are satisfied that in the present case in the interests of justice an order for a retrial is worthy. Therefore, since the trial was vitiated, we nullify the trial proceedings on account of irregular summing up to the assessors, quash and set aside the

conviction and the sentence meted on the appellant and order an expedited fresh trial before another Judge and a new set of assessors. Meanwhile, the appellant shall remain in custody pending retrial.

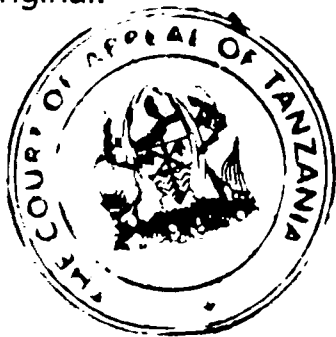
DATED at **TANGA** this 31st day of May, 2021.

S. E. A. MUGASHA
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

The judgment delivered this 1st day of June, 2021 in the presence of Mr. Christopher Wantoro, learned counsel for the appellant and Mr. Pius Hilla, learned Senior State Attorney and Mr. Waziri Magumbo, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.




F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL