IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

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

CRIMINAL APPEAL NO. 78 OF 2019

CHARLES SAMWEL ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Luvanda, J.)

dated the 11th day of March, 2019
in
Criminal Sessions Case No. 83 of 2016

.....

RULING OF THE COURT

4th May & 22nd June, 2021

KOROSSO, J.A.:

The appeal before us is against the judgment of the High Court of Tanzania sitting at Dar es Salaam (Luvanda, J.) in Criminal Sessions Case No. 83 of 2016 convicting the appellant, Charles Samwel, of murder contrary to section 196 of the Penal Code, Cap 16 RE 2002 (the Penal Code).

Before we proceed further, we find it pertinent to commence with a brief account of the factual setting of the case. It is alleged that the appellant, on the 17th March, 2015 at Chanika Logoale area within Ilala District in Dar es Salaam Region, murdered Ashibahe Hussein. To prove their case, the prosecution relied on the evidence of

five (5) witnesses and six (6) exhibits. On the part of the defence, the appellant was the only witness to testify.

According to Mbaru Hassan Hamad (PW4) he purchased a motorcycle with registration No. MC 523 AHW (exhibit P4) on 28th February, 2015 and handed it to the deceased on a gentleman's agreement, where the deceased was to pay to him Tshs. 10,000/- daily and after ten months, ownership of the motorcycle was to be transferred to the deceased. On the 17th March, 2015 at 7.30 hours, PW4 received information regarding the death of the deceased and the theft of the motorcycle. His follow-up led him to the scene of crime and saw the body of the deceased which had wounds from injuries sustained and signs of bleeding from the chest to the head. Stephano Paskali (PW3), the appellant's uncle testified that on 18th March, 2015 around 11.00 hours, on receiving information from one Kelvin, that there was a motorcycle parked inside the premises they lived in, decided to go there to verify the information and thereafter he reported the matter to the police. PW3 was the one who rented the said premises for his workers, including the appellant.

F8132 DC Gasper (PW2) was the police officer who responded to the report by going to the premises where the report stated there

was a strange motorcycle (exhibit P4) and his search led to its seizure there. The appellant was then arrested and taken to the police station. He was later arraigned in court facing charges of murder as alluded to herein. The appellant gave an affirmed testimony denying the charges and contended that the charges were framed based on existing ill relationship between himself and his uncle (PW3).

After a full trial, the High Court Judge convicted the appellant for the offence charged being satisfied that the case against the appellant was proved beyond reasonable doubt. Dissatisfied, the appellant filed a memorandum of appeal with three supplementary memoranda of appeal with a total of forty-one (41) grounds of appeal. Nonetheless, for a reason that will become apparent herein, we shall not recapitulate the grounds of appeal.

At the hearing of the appeal, the appellant enjoyed the services of Mr. Roman S. L. Masumbuko learned Advocate and Ms. Mwanaamina Kombakono, learned Senior State Attorney assisted by Ms. Esther Chale, learned State Attorney represented the respondent Republic.

Before the parties could argue the appeal on merits, we invited them to address us on whether the learned trial judge's direction to

the assessors in the summing up was sufficient within the confines of the law and practice and if not, what are the consequences thereto.

Mr. Masumbuko faulted the Honorable trial judge for omitting to properly direct the assessors during his summing up to them on essential elements of the case which the trial court relied upon to convict the appellant. These included the essence and import of the doctrine of recent possession and circumstantial evidence. According to the learned counsel the said omission was a fatal irregularity because it amounted to conducting a trial without the aid of assessors and thus contravening section 265 of the CPA. He contended that the anomaly meant that the appellant was not tried fairly and essentially the trial was a nullity. He argued that the conviction against the appellant should therefore be quashed and the sentence be set aside.

With respect to the way forward, the learned counsel argued that although usually an order for retrial is one preferred in such situations, in the present circumstances it is not the best available remedy taking into account the weakness in the prosecution evidence against the appellant and various irregularities discerned. Mr. Masumbuko argued further that an order for retrial will provide the prosecution with leeway to fill in the revealed gaps in the evidence.

According to the learned counsel there is no tangible evidence presented in the trial court that proved the case against the appellant. Additionally, he challenged the admissibility of the cautioned statement (exhibit P5) stating that the contents therein clearly do not warrant to be considered as a confession as defined under section 3 of the Tanzania Evidence Act, Cap 6 RE 2002 (the TEA) and therefore it should neither have been admitted nor relied upon to convict the appellant.

The learned counsel also challenged the fact that some material witnesses were not called to testify and their absence left a lot of gaps in the prosecution evidence. He referred to the absence of the ten-cell leader one Edmund Martin, who he contended would have assisted to corroborate the alleged admission by the appellant and bolstered the evidence related to the seizure of the exhibit P4. He argued that from the evidence, Edmund Martin seemed to have been the only independent witness during the seizure of exhibit P4. Another important witness not called to testify for the prosecution was one Kelvin, who according to PW3 was the one to relay information on exhibit P4 being at the premises resided by the appellant.

Mr. Masumbuko further contended that, another infraction in the prosecution evidence relates to the testimony of PW4 whose substance of evidence was not disclosed during committal proceedings. He reasoned that in the absence of any notice of additional witness for him to testify within the confines of section 289 (1) of the CPA, his testimony should be expunged together with all the exhibits which were admitted having been tendered by him. The counsel further argued that the highlighted anomalies are crucial and further expose the weakness of the prosecution case and should lead to a finding that if a retrial was to be ordered, it would afford an opportunity for the prosecution side to rectify the said anomalies.

In consequence thereto, he prayed that the Court exercises its revisional powers under section 4(2) of the Appellate Jurisdiction Act, Cap 141 RE 2002 (the AJA) to quash the conviction, set aside the sentence and set free the appellant.

On the part of the learned Senior State Attorney onset, she was in tandem with the arguments fronted by the learned counsel for the appellant that the learned trial Judge's direction to the assessors in the summing up was insufficient for failure to address them on some vital points of law relevant to the case. She also agreed that the

essence and relevant guidelines related to reliance on circumstantial evidence and recent possession to find a conviction were important and should have been part of the summing up done by the trial court. The learned Senior State Attorney maintained that essentially the learned Trial Judge failed to properly address the assessors to lead to a fair trial. To support her argument, she made reference to the case of **Aliegar Mohamed vs Republic**, Criminal Appeal No. 64 of 2019 (unreported).

On the way forward, Ms. Kombakono concurred with the learned counsel for the appellant, stating that although ordinarily the remedy should have been for the Court to order a retrial, but since the trial was tainted with irregularities as presented by the learned counsel for the appellant, a retrial will not be the best option under the circumstances. She contended further that apart from the defects highlighted by the learned counsel for the appellant, other concerns included the fact that the postmortem report admitted as Exhibit P1 was not read upon admission.

The learned Senior State Attorney also conceded that there were material witnesses who were not called as witnesses without reasons for their absence being provided. Furthermore, she argued

that even procedures for the seizure of exhibit P4 were flouted. She therefore asserted that irregularities discerned in the prosecution evidence weakened the prosecution case. This being the position she argued, a retrial will undoubtedly provide the prosecution to do away with identified gaps in evidence. She thus prayed that the Court nullify the proceedings, quash the conviction and set aside the sentence and consequently, set free the appellant.

The rejoinder by the counsel for the appellant was in essence mainly to reiterate his earlier submissions and prayers.

We have dispassionately considered the submissions and references by the learned counsel for both sides. It is pertinent, to reproduce the relevant provisions addressing the role of assessors and their importance to the conduct of the trial of the High Court expected to be held with aid of assessors.

Section 265 of the CPA states:

> *"All trials before the High Court shall be with the ald of assessors the number of whom shall be two or more as the court thinks fit."*

Section 298 (1) and (2) of the CPA states:

> "(1) *When the case on both sides closes, 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.*"

Section 265 of the CPA, essentially envisages that all the trials in the High Court be conducted with the aid of two or more assessors. Section 298 (1) of the CPA requires the trial judge to sufficiently sum up the evidence of both sides in the case to the assessors after both sides have closed their cases, so that thereafter they can give their opinions regarding the case. In **Mbalushimana Jean-Maria Vianney @Mtokambali vs Republic**, Criminal Appeal No. 102 of 2006 (unreported), which made reference to the decision of the defunct East African Court of Appeal in **Washington Odindo vs Republic** (1954) 21 EACA 392, it was stated: -

> "The *opinion of assessors can be of great value and assistance to a trial judge but only if they fully understand the facts of the case before them in relation to the relevant law. If the law is not explained and attention not drawn to the salient facts of the case, the*

value of assessors' opinion is correspondingly reduced'.

(See also, **Kato Simon and Another vs Republic**, Criminal Appeal No. 180 of 2017 (unreported)).

It has also been held that failure to address assessors on vital points of law renders the entire proceedings a nullity as held in the case of **Tulibuzwa Bituro vs Republic** [1982] TLR 264. In **Said Mshangama @Senga vs Republic**, Criminal Appeal No. 8 of 2014 (unreported), this Court held: -

> "Where *there is inadequate summing up, no 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*".

Our perusal of the record of appeal has gauged that in the current appeal, during the summing up to assessors, circumstantial evidence and recent possession were only discussed in passing, we reproduce the relevant section for ease of reference, it reads: -

> "*May be I should point out that the evidence is hinged on circumstantial evidence there being no eye witness. Also there is a doctrine of recent possession of a property which is*

alleged was in possession of the deceased before his death. You must consider also whether a property like motorcycle is that which can easily change hands within a short period of less than twenty hours."

Similarly, our further examination of the record of appeal has gathered that the learned trial judge's conviction of the appellant was essentially underpinned by the trial court being satisfied that circumstantial evidence irresistibly pointed to the guilty of the appellant as discerned from the finding of the trial court, in its judgment that: -

"In the circumstances there is no doubt that the accused was involved in the killing of the deceased. All the circumstances point irresistibly to be the one concerned".

Similarly, the learned trial judge further considered and applied the doctrine of recent possession to convict the appellant by stating:

"I say so, as a motor cycle was seen in possession of the accused within a period of not less than thirty six hours from occurrence of incident. It is to be noted that a motor cycle is not among the item which can easily change hands with such a short period of time".

Again, the learned trial judge at page 101 of the record of appeal holds:

> *"I therefore differ with opinion of gentlemen assessors who entered an unanimously (sic) verdict of not guilty. As apart from the circumstantial evidence irresistibly point to the accused guilty for being found in possession of recent stolen property, there was evidence of a cautioned statement which the accused had explained to had been made just half an hour after arrest and which was proved to be voluntary, the accused confessed to had attacked the deceased as aforesaid."*

Adverting to the above excerpts, it is apparent that the appellant's conviction was founded on circumstantial evidence, application of the doctrine of recent possession and reliance on the retracted confession. Consequently, the pending matter for determination is whether the meaning, essence and import of the above vital points of law were duly explained to the assessors during the summing up.

Counsel for both sides conceded that what was expounded by the trial judge on the two vital points of law mentioned above was not appropriate to enable the assessors to understand the essence and

substance of circumstantial evidence or the doctrine of recent possession and their relevance to the case. Under the circumstance, we agree with the arguments of the learned counsel for both sides that the learned trial Judge did not properly direct the assessors on the vital points of law highlighted herein and this was a fatal irregularity. We hold so, guided by the settled stance on this issue found in the decisions of this Court such as **Charles Lyatii @Sadala vs Republic**, Criminal Appeal No. 290 of 2011 and **Mara Mafuge and Six Others vs Republic**, Criminal Appeal No. 29 of 2015 (both unreported). In both cases it was held that non direction to assessors on vital points of law in the summing up renders the proceedings is as good as if the trial was without the aid of assessors and essentially, it is contravention of section 265 and 298 of the CPA.

On the consequences of the non-direction of the assessors on vital points of law, as rightly submitted by the learned counsel for both sides, ordinarily, the way forward would have been to order a retrial. The question before us then is whether the conditions that moves the Court to order a retrial prevail in the present appeal.

The counsel for the parties agreed that the prosecution case was tainted with irregularities and weakness. Indeed, to determine

whether or not a retrial should be ordered we are guided by the decision in **Fatehali Manji vs Republic** [1966] E.A 341, which held that a retrial should be ordered only when the original trial was illegal or defective and should not be ordered where the prosecution evidence is patently weak and by ordering a retrial, the prosecution will seize that opportunity to fill up gaps at the prejudice of the appellant. The said observations where further amplified in the case of **Selina Yami and Others vs Republic**, Criminal Appeal No. 94 of 2013 where this Court stated 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."*

The defects and gaps in the prosecution case have been conceded by the learned Senior State Attorney, we will present the prominent ones. **One,** failure to call material witnesses to testify for the prosecution side. As rightly argued by the learned counsel for the appellant and agreed by the learned Senior State Attorney the seizure

of the motorcycle by PW2 leaves much to be desired since there was no independent witness called to testify to corroborate the said seizure. The record of appeal shows that the only witness that can be termed independent was the ten-cell leader who was not called as a witness to testify nor were any reasons provided for his failure to appear. Similarly, another witness we find was important and not called to testify was one Kelvin, for according to PW3's testimony, he was the one who told him about the motorcycle in question being at the appellant's premises. Again, there was nothing stated regarding his failure to testify at the trial.

Whilst we are aware of the provisions of section 143 of the TEA, that there is no number of witnesses required to prove a fact as also aptly discussed in **Yohanis Msigwa vs Republic** [1990] T.L.R. 148, **Gabriel Simon Mnyele vs Republic**, Criminal Appeal No. 437 of 2007 (unreported) and **Godfrey Gabinus @Ndimbo and 2 Others vs Republic**, Criminal Appeal No. 273 of 2017 (both unreported). Section 122 of TEA states that the Court may draw adverse inference in certain circumstances against the prosecution for not calling certain witnesses without showing any sufficient reasons as held in **Aziz Abdallah vs Republic** [1991] T.L.R. 71.

As alluded to herein, the evidence of Martin, the ten-cell leader was very important to substantiate claims by the prosecution that the seizure of the motorcycle was done properly. The evidence of Kevin would have bolstered the evidence of having seen the motorcycle at the appellant's premises and whether the appellant was the one who kept it there or not. The importance of these witnesses was conceded by the learned State Attorney, and no reasons were advanced explaining their absence. We have taken all concerns into consideration and we are persuaded that this is one case to infer an adverse inference to the failure of the prosecution side to call the two witnesses to testify.

Two, testimony of witnesses who were not part of committal proceedings. Section 289 of the CPA states:

> *"289-(1) No witness whose statement or substance of evidence was not read at committal proceedings shall be called by the prosecution at the trial unless the prosecution has given a reasonable notice in writing to the accused person or his advocate of the intention to call such witness".*

The import of the above section is that no witness whose statement or substance of his evidence was not read at the committal

proceedings shall be called by the prosecution as a witness at a trial unless a notice in writing is given within the confines of the provision. In the present case, the statement or substance thereof of the evidence of Mbaru Hassan Hamad who testified as PW4 in the trial was not read over in the committal proceedings as seen at page 23 and 24 of the record of appeal. We have not found any notice requesting for additional witnesses with his name in the record of appeal. The learned State Attorney also conceded to the fact that there was no such notice. This being the case his testimony was in contravention of section 289(1) of the CPA.

The provisions of sections 246(2) and 289(1), (2) and (3) of the CPA are relevant in addressing this matter. In the case of **Jumanne Mohamed and 3 Others vs Republic**, Criminal Appeal No. 534 of 2015 (unreported) we stated that: -

> "*We are satisfied that PW9 was not among the prosecution witnesses whose statements were read to the appellants 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."

(See also, **Peter Charles Makupila @Askofu vs Republic**, Criminal Appeal No. 21 of 2019 and **Castor Mwajinga vs Republic**, Criminal Appeal No. 268 of 2017 (both unreported).

The evidence of PW4 was undoubtedly taken contrary to the law. We accordingly expunge the respective evidence together with all exhibits he tendered and were duly admitted by the trial court that is, the motorcycle registration card (exhibit P6).

Guided by the principle laid down in **Fatehali Manji vs Republic** (supra), we do not think this is a fit case for ordering a retrial. We shall demonstrate. **One**, as pointed out by both counsel and we have established herein, the prosecution case has extensive gaps and defects and if a retrial is ordered it will afford them an opportunity to fill the gaps in their evidence to the detriment of the appellant. **Two**, 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.

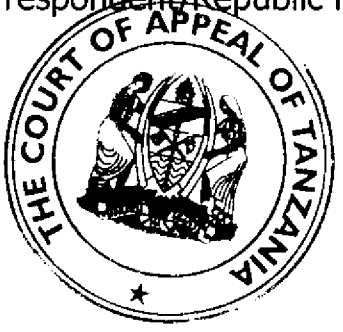
In the premises, we invoke section 4(2) of the Appellate Jurisdiction Act, Cap 141 RE 2002 to nullify the proceedings, quash the judgment and conviction and set aside the sentence. The appellant to be released from custody henceforth unless otherwise held for other lawful purpose.

DATED at **DAR ES SALAAM** this 15th day of June, 2021.

S. E. A. MUGASHA
JUSTICE OF APPEAL
W. B. KOROSSO
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

The ruling delivered this 22nd day of June, 2021 in the presence of Ms. Velena A. Clemence, learned counsel for the appellant and the appellant linked through video conference from Ukonga prison and Mr. Medalakini Emmanuel Godwin, learned State Attorney for the respondent/Republic is hereby certified as a true copy of the original.



H. P. NDESAMBURO
DEPUTY REGISTRAR
COURT OF APPEAL