IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

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

CRIMINAL APPEAL NO. 75 OF 2019

1. **RONJINO S/O RAMADHANI @ RONJI**
2. **JAFARI S/O SEIF SHABANI** ..... **APPELLANTS**
3. **PASCAL S/O BENEDICT MHINDI**

VERSUS

THE REPUBLIC ..... **RESPONDENT**

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

(Magoiga, J.)

dated the 12th day of March, 2019

In

Criminal Case No. 43 of 2018

JUDGMENT OF THE COURT

30th April & 17th May, 2020

KITUSI, J.A.:

This is an appeal from a conviction and sentence for murder contrary to section 196 of the Penal Code. The deceased Maadhi Juma was a bodaboda rider, and it is alleged that he was fatally attacked by people who then made away with his motorcycle and further that the appellants are allegedly the ones who attacked the deceased and stole his motorcycle.

The prosecution had two pieces of evidence against the appellants. It is that on 25/6/2014 at around 19.50 hours the first appellant approached

the deceased at Mbezi Juu area in Dar es Salaam and wanted a ride to Mbezi Beach area. Meanwhile at Mbezi Beach, one Anastazia Mathias (PW6) saw two people pacing around outside her residence and for some reason, suspicion got the better of her. Thus, although she had intended to go to a neighbour to get a match box, she decided to take cover so as to observe what the two people were up to.

PW6 testified that before relocating to Mbezi Beach area, she had previously been living at Kawe area near the first appellant's residence. Further that the two people she saw pacing around near her house, used to be frequent visitors of the first appellant at Kawe. Therefore, she recognized them.

Back to Mbezi Juu area. The deceased agreed to take the first appellant to Mbezi Beach. At a certain point within Mbezi Beach area, the first appellant instructed the deceased to stop as he had arrived at his destination. That destination turned out to be near PW6's residence where the two people were seen by her, pacing around. Unaware that someone was within eyeshot and observing every move, the first appellant alighted from the motorcycle and pretended to prepare money so as to pay for the

ride, but that was never the intention. Instead, one of the two people picked a big stone with which he hit the unsuspecting deceased on the head. The trio rode off on the motorcycle, leaving the owner for the dead.

PW6 listed assistance of a neighbour with whom she approached the attacked victim of the robbery who was lying unconscious. PW6 hired a rickshaw (Bajaji) and took the injured man to police where she obtained a PF3 before proceeding to hospital. At police, PW6 stated that she identified the perpetrators of the robbery, and on 23/7/2014 she identified them during a parade of identification. She easily picked the first appellant out of the first group. In the second and third groups she identified the second and third appellant's as frequent visitors at the first appellant's residence at Kawe area. So much for the first piece of evidence.

The second piece of evidence is the dying declaration allegedly recorded from the deceased on 26/6/2014 before he succumbed to death. It was Assistant Inspector Strimus Maroboto (PW2) who recorded the statement and had it tendered as Exhibit P3. In that statement, the deceased named one Ronjino as the person he took to Mbezi Beach on the fateful evening.

In defence, the first appellant told a story of how he was arrested on 20/7/2014 in connection with completely different suspicions but found himself facing the charge of murder which he knew nothing about. He said while driving around in a family car within the city, the police stopped him for what appeared to be routine check. But then the drama started when one of them suspected him as being a suspect the police had been looking for in connection with dealing in *Khat*. When he could not yield to the police demand for money as bribe, they took him to custody and later charged him jointly with the second and third appellants who were strangers to him.

The first appellant raised issue with PW6's evidence and wondered why did she not immediately lead the police to his residence to effect arrest if it is true that she knew him as she purported to. He further said that the prosecution did not provide a link between his arrest and PW6's alleged information implicating him.

The second appellant said he was at police station on 1/8/2014 in connection with an incident completely unrelated to the murder of Maadhi Juma. He said on 1/8/2014 he got involved in a fight at a night club, in the

course of which some items of value were destroyed. So, while at the police station with the owner of the club trying to sort out how the second appellant would compensate for the damage, the police booked him for murder along with others. The same was with the third appellant, a mechanic who said he was arrested on 25/7/2014 allegedly for having stolen a camera from his client's vehicle he had been fixing.

The assessors who participated in the trial unanimously returned a verdict of not guilty, but the learned trial Judge was opposed to them. He placed so much weight on the dying declaration which he was satisfied, complied with the requirements of section 34 B (1) and (2) (a) to (f) of the Tanzania Evidence Act, [Cap 6 R.E 2002]. He was equally satisfied that the deceased named the first appellant as soon as he was able to talk, and he indicated in that statement that the other two men must have been working together with him. The learned Judge was also impressed by the testimony of PW6. He referred to that evidence and concluded that PW6's evidence of visual identification left no possibility of mistake because she observed the culprits at a close range of 5 meters at a well-lit surrounding.

The learned Judge rejected the defence case. The first appellant's case was considered inadequate because he did not mention the name of the police officer who allegedly demanded bribe from him. The second appellant just did not impress the learned trial Judge. As for the third appellant the Judge took the view that he should have substantiated his story by calling some of the garage boys who witnessed the camera theft drama. Consequently, the learned Judge convicted the appellants and sentenced them to the mandatory death sentence. Aggrieved, the appellants are before us on appeal.

The appellants had presented six grounds of appeal in their first memorandum of appeal which was later supplemented by two sets of supplementary memoranda of appeal. At the hearing however, Mr. Albert Msando and Nehemia Nkoko, learned advocates, who represented the appellants, sought to argue only two grounds of appeal appearing in the first memorandum of appeal. These are grounds 2 and 6, the substance of which read: -

2. THAT, the learned trial judge erred in law and facts in convicting the appellants basing on evidence of assistant inspector Strimus (PW2); Dr. Innocent Justine; Inspector

Abdallah (PW4) and D.8214 D/Sgt Emmanuel (PW7) whose statements were not read during the committal proceedings.

6. THAT the learned trial judge erred in law and in fact in holding that the prosecution proved its case beyond reasonable doubt while it presented weak evidence.

Before addressing those grounds, counsel for the appellants sought and we granted them leave to address a new ground of appeal faulting the trial judge for making an inadequate summing up to assessors. Ms. Mkunde Mshanga, learned Senior State Attorney and Ms. Grace Lwila, State Attorney, who represented the respondent Republic, did not object to the prayer, principally because they shared similar worries with the defence counsel, if the summing up to assessors was as per law. We have chosen to start with what is required of a judge in summing up, then test it against the facts of this case.

Enough has been said on summing up in our previous decisions, and we think it will cause no harm restating the principles, which we shall do by reproducing a paragraph in our decision in the case of **Joseph Shegembe**

v. The Director of Criminal Prosecutions, Criminal Appeal No. 222 of 2018 (unreported). We stated, inter alia: -

> *"The purpose of summing up to assessors is to enable the assessors arrive at a correct opinion. It is incumbent on the trial judge, in summing up the case to the assessors, to explain fully the facts of the case before them in relation to the relevant law. The learned judge has to properly direct the assessors on vital points of law for them to give a focused opinion. The Court has consistently held that non-direction or misdirection of assessors on vital points of law vitiates a trial. [See* ***Tulubuzya Bitulo vs R*** *[1982] TLR 264,* ***Jesinala Malamula vs R*** *[1993],* ***Maweda Mashauri Majenga @ Simon vs Republic,*** *Criminal Appeal No. 292 of 2014 (unreported)]".*

What then is the nature of the complaint in this case? Mr. Nkonko submitted, and Ms. Lwila conceded, that the learned trial Judge did not direct the assessors' minds on the evidence of dying declaration and how to apply it. The other aspect is the evidence of visual identification by PW6 and the factors that would affect a correct identification at night. Even

though more complaints were raised, the two areas are sufficient for the purpose of our determination because they are the basis of the conviction by the trial court. Counsel for both sides moved us to find that trial of this case was vitiated for being conducted without the aid of assessors, so we should proceed to nullify it.

Without any hesitation, we agree with counsel. As we indicated from the very beginning, the conviction of the appellants was found on the evidence of visual identification by PW6 and the dying declaration that was recorded by PW2. However, in the summing up to the assessors, there is merely a summary of the evidence of witnesses with no explanation of the key factors to be considered in assessing evidence of visual identification at night. Neither is there any direction on the technical aspects of a dying declaration, for it to form a basis of conviction. It cannot therefore be said that, section 265 of the Criminal Procedure Act, [Cap 20 R.E 2002], (the CPA) which requires trial to be by the aid of assessors, and section 298 (1) of the CPA which requires assessors to give their opinions, were complied with. The proceedings were a nullity and we declare so. What then should be our orders in relation to the substance of the case? Ordinarily we can order a retrial if there is reason to do so.

In this case there is consensus that we should not order a retrial. Mr. Msando and Mr. Nkoko submitted that the dying declaration had two main ailments. One, as complained in ground No. 2 of appeal, it was recorded and tendered by PW2 whose statement was not read over during the committal proceedings. Two, the said dying declaration has, in fact, no declaration in it.

We are going to consider whether or not to order a retrial by looking at the two pieces of evidence. We shall begin with the dying declaration (Exhibit P3), and we have resolved that we shall not discuss its form and the contents. This is because it was tendered by a witness who ought not to have testified, he having not previously featured in the committal proceedings by reading the substance of his intended evidence, as submitted by counsel. We firmly take it to be an aspect of fair trial provided under section 289 (1) of the CPA, that statements of witnesses intended to be used by the prosecution should be read over during committal proceedings, so as to keep the accused informed ahead of the trial. See some of our decisions on this, such as **Hamisi Meure v. Republic,** [1993] T.L.R 213 and **Francis Siza Rwambo v. Republic**, Criminal Appeal No 17 of 2019 (unreported). Therefore, if we order a

retrial, there will be no evidence of PW2 as well as the dying declaration (Exhibit P3), to be used by the prosecution.

We are left with the evidence of PW6. In ground 6 of appeal, the appellants complain that the prosecution did not prove the case beyond reasonable doubt. We shall test this complaint against the evidence of PW6 and the submissions made. We shall also consider the defence case. To begin with, Mr. Nkoko submitted that the evidence of visual identification was weak because PW6 did not describe the source of light and its intensity. Further that she simply stated that one of the two men picked a stone and hit the deceased with it, without specifying which one.

Mr. Msando attacked PW6's credibility. He wondered what could have been her motive to stop what she had been doing and take cover to watch people when at that time she had no reason to believe they were planning to commit an offence. He also pointed to the fact that it took PW6 too long to name the suspects. Counsel also submitted that the trial court did not consider the defence case.

With respect, we see the points made by counsel. Considering that the time of the night was just around 8.00 pm, we are disturbed by PW6's

curiosity that made her abandon what she had been doing, to play the role of a spy, and doing so when she had no prior clue that an offence was about to be committed. We are also uncomfortable that she did not act equally smart subsequently in naming the suspects whom she said she knew too well. But again, while in her testimony PW6 says that at the time of obtaining the PF3 she told the police what she saw at the scene and who were involved, PW2 who attended to her testified that she did not disclose anything to him at that time. This contradiction between PW2 and PW6 on this very material point, does not seem minor to us and it does not speak well of PW6's credibility. In the case of **Mohamed Said v. Republic**, Criminal Appeal No. 145 of 2017 (unreported) we restated the principle that a witness who tells a lie on an important point should hardly be believed on other important points. See also **Bahati Makeja v. Republic,** Criminal Appeal No. 118 of 2006 (unreported). Therefore, we take with a pinch of salt PW6's story that she identified the appellants. We decline to go with her version without any evidence corroborating it.

It has also been alleged that the trial court did not consider the defence. With respect we disagree. Conversely, we think the trial court considered the defence but shifted the burden and required the appellants

to prove their stories. It required the first appellant to have substantiated his story of bribe by mentioning the name of the police officer who demanded it. It required the third appellant to have proved his defence by calling one of the garage boys who had witnessed the allegation of theft of the client's camera. This approach was manifestly wrong because it has never been the duty of an accused to prove his innocence. This is an established principle and has been repeated in many of the Court's decisions. See for instance **Mohamed Said Matula v. Republic** [1995] T.L.R 3 and **Hamisi Mbwana Msuya v. Republic**, Criminal Appeal No. 73 of 2016 (unreported). It was the duty of the trial court to address if the defence evidence had introduced reasonable doubt in the prosecution case.

So, our conclusion is that the remaining evidence, that of PW6, was doubtful and the defence made it even weaker. There is no connection whatsoever between PW6's alleged identification of the appellants on 25/4/2014 and the arrest of those appellants in July and August 2014.

In view of those inadequacies in the evidence for the prosecution, we agree with counsel for the appellants and Ms. Lwila, learned State Attorney for the Republic, that an order of retrial is uncalled for. We nullify the

proceedings, quash the conviction and set aside the death sentence that was imposed against the appellants. We order their immediate release from prison unless their continued incarceration is otherwise lawfully justified.

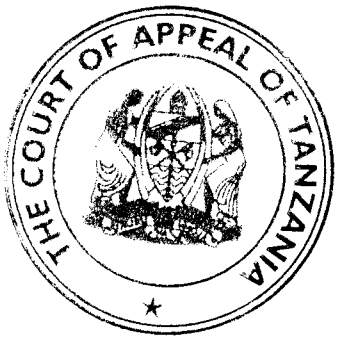
DATED at **DAR-ES-SALAAM** this 12th day of May, 2021.

S. E. A. MUGASHA
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

Judgment delivered this 17th day of May, 2021 in the presence of Mr. Albert Msando, learned counsel for the appellants and Mr. Mwaitenda Benson, 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