IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: NDIKA, J.A., FIKIRINI, J.A., And KIHWELO, J.A.)

CRIMINAL APPEAL NO. 433 OF 2017

MASUMBUKO MAKELEZE @ KOSOVO ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Decision of the High Court of Tanzania at Geita)
(Levira, J.)

dated the 18th day of November, 2015
in
Criminal Sessions Case No. 12 of 2012

.....

JUDGMENT OF THE COURT

9th & 13th July, 2021

NDIKA, J.A.:

Following his trial by the High Court of Tanzania sitting at Geita (Levira, J. as she then was), the appellant, Masumbuko Makeleze @ Kosovo, was on 18th November, 2015 found guilty of murdering Neema d/o Katumani ("the deceased") on 10th February, 2009 at Kayenze area, Bugogo village within Geita District in Mwanza Region. He was duly convicted and accordingly sentenced to suffer death by hanging. He now appeals against conviction.

It was common ground that the deceased died violently on 10th February, 2009. According to the post-mortem examination report on her body (Exhibit

P.1), whose contents were also undisputed, the death resulted from *"haemorrhagic shock due to excessive blood loss."* The body was *"soiled with blood clots with multiple cut wounds, in rigor mortis stage ...."* The skull exhibited *"linear open fracture on the occipital bone approximately 6 cm long."* The question at the trial was, therefore, whether the appellant was the murderer.

To establish its case, the prosecution featured five witnesses: PW1 Martha Levi, PW2 Thomas Barnaba, PW3 Omari Hamadi, PW4 Geremia Mayala and PW5 Police Officer No. D.8307 D/S.Sgt Zakayo. Apart from the post-mortem examination report (Exhibit P.1), the prosecution tendered a sketch drawing of the scene of the crime (Exhibit P.2). On the part of the appellant, he gave affirmed evidence supported by three pieces of documentary exhibits but he did not call any witness.

Briefly, the prosecution case tended to show that while at home on the fateful day at 9:00 a.m., PW1 saw the appellant, a fellow villager, arrive at the scene. The appellant approached where the deceased was and exchanged with her some pleasantries. He then asked her where her husband was and she replied that he was away on a trip. There and then, the appellant drew an axe

that he had hidden and cut her with it on the head three times. The deceased fell down and died on the spot.

PW2 did not witness the killing of the deceased, his grandmother. But, he said that he was outside the home about fifteen paces from where she was when she was hit and killed. According to him, he saw the appellant, with whom he was familiar, as he arrived at their home and proceeded to where the deceased was. Again, he saw him when he left the scene apparently after the deceased had been attacked and killed. PW2 walked in after hearing some worrying noises only to find the deceased dead, her body revealing a wound on the head.

PW4, the village Chairman, went to the scene in response to the alarm. He found the deceased's body lying on the ground with multiple wounds on the head. There was further evidence from PW3 who related to the trial court how he arrested the appellant at Kahama on 14th April, 2009, about two months after the deceased's death. On the part of PW5, his evidence concerned various aspects of the investigations into the deceased's killing.

In his defence, the appellant totally denied the accusation against him. He raised an *alibi* to the effect that on the fateful day he was in Kahama for business. He admitted being familiar with the deceased and PW1.

At the conclusion of the cases for the prosecution and defence, the learned trial Judge summed up the case to the assessors who then returned a unanimous verdict of guilty against the appellant. Siding with the assessors, the learned trial Judge found it proven upon the evidence of PW1 and PW2 that the appellant was positively recognised in the fateful morning at the scene of the crime and that he was witnessed by PW1 killing the deceased. She rejected the appellant's *alibi* mainly on the ground that it was not supported by any independent evidence and that it raised no reasonable doubt. The learned Judge found further that the killing was premeditated, hence it was actuated by malice aforethought.

This appeal was initially predicated on a self-crafted five-point memorandum of appeal lodged on 7th August, 2019. On 18th June, 2021, the appellant's counsel on dock brief, Mr. Cosmas Tuthuru, filed a four-point supplementary memorandum of appeal in terms of rule 73 (2) of the Tanzania Court of Appeal Rules, 2009 in substitution of the earlier memorandum. The said supplementary memorandum raises the following grounds:

> *"1. **That**, the Honourable trial Judge erred to convict the appellant on the basis of the testimonies of the prosecution witnesses, to wit, PW1 Martha Levi, PW2 Thomas Barnaba, PW3 Omari Hamadi, PW4 Geremia Mayala and PW5 No.*

D.8307 D/S.Sgt Zakayo while the Honourable trial Judge failed to append her signature after taking down the evidence of every witness which means there is no evidential material upon which the appellant could be convicted.

2. ***That**, there is inadequate summing up to the assessors who participated at the trial regarding the rule governing malice aforethought which was highly relied upon by the trial Judge in her judgment to convict the appellant.*

3. ***That**, the trial Judge failed to consider that the prosecution witnesses, to wit, PW1 Martha Levi and PW2 Thomas Barnaba were not credible witnesses due to the inconsistencies of statements previously made by them at the police and their testimonies in court to secure a conviction against the appellant.*

4. ***That**, the offence of murder with which the appellant was charged was not proved against the appellant."*

At the hearing of the appeal before us, Mr. Tuthuru, represented the appellant who also appeared via a video link from Butimba Central Prison. For the respondent, Mr. Hezron Mwasimba, learned Senior State Attorney, appeared together with Ms. Gisela Alex, learned State Attorney.

In his oral argument in support of the appeal, Mr. Tuthuru addressed the first and second grounds of appeal but abandoned the other two grounds. On

the first ground, he faulted the learned trial Judge for not appending her signature at the end of the testimony of each witness. It was his contention, on the authority of the recent decision of the Court in **Sabasaba Enos @ Joseph v. Republic**, Criminal Appeal No. 411 of 2017 (unreported), that the said omission was an incurable irregularity. For this proposition, he referred us to pages 10 to 11 of the typed decision in **Sabasaba Enos** (*supra*) where the Court excerpted a passage from its earlier decision in **Yohana Mussa Makubi v. Republic**, Criminal Appeal No. 556 of 2015 (unreported) on the same issue as follows:

> *"We are thus satisfied that the failure by the judge to append his/her signature after taking down the evidence of every witness is an incurable irregularity in the proper administration of criminal justice in this country. The rationale for the rule is fairly apparent as it is geared to ensure that the trial proceedings are authentic and not tainted. Besides, this emulates the spirit contained in section 201 (1) (a) of the CPA and we find no doubt in taking inspiration therefrom."*

In demonstrating the alleged omission, Mr. Tuthuru referred us to pages 63, 75, 82, 90 and 99 showing the end of the evidence in chief, respectively, for PW1, PW2, PW3, PW4 and PW5. When queried by the Court if a testimony

of a witness ends with the close of the examination in chief, the learned counsel answered in the affirmative. He insisted that the requirement to append signature does not relate to the next stages of an examination of a witness (cross-examination and re-examination). For that omission, he urged us to nullify the trial proceedings and the decision thereon.

Submitting on the propriety of the summing up to the assessors, Mr. Tuthuru argued that the learned trial Judge gave a copious narrative of the evidence on record but failed to explain to the assessors the meaning and importance of the concept "malice aforethought", which is an essential ingredient of the offence of murder as stated under sections 196 and 200 of the Penal Code, Cap. 16 R.E. 2002 (now R.E. 2019). Elaborating, he contended that while the learned trial Judge raised up the point rather fleetingly in her summing up notes as shown at page 148 of the record of appeal, she dealt with it in detail in her judgment, as revealed at pages 205 to 207 of the record of appeal. To bolster his submission, the learned counsel cited **Theophil Haule v. Republic**, Criminal Appeal No. 315 of 2018 (unreported) where the Court confronted a similar omission and, consequently, nullified the entire proceedings of the High Court as well as the decision thereon.

In response to a query from the Court on how the appellant's *alibi* was addressed in the summing up, Mr. Tuthuru contended that the learned trial Judge summarized the facts constituting the alleged *alibi* but did address the law on that aspect. He elaborated that the learned Judge went on in her judgment (at page 143 of the record of appeal) to reject the defence on the ground that it had not been proved. Again, on account of the alleged non-directions in the summing up, the learned counsel urged us to nullify the trial proceedings and the decision thereon.

As regards the way forward, Mr. Tuthuru urged us to order a retrial of the case commencing right after the preliminary hearing. He cited **Rex v. Noormohamed Kanji** (1937) 4 EACA 34; and **Peter Charles Makupila @ Askofu v. Republic**, Criminal Appeal No. 21 of 2019.

Replying, Mr. Mwasimba, while acknowledging the position stated in **Sabasaba Enos** (*supra*) and **Yohana Mussa Makubi** (*supra*), countered that the testimonies of all prosecution witnesses were properly recorded and signed. Referring to pages 71, 80, 84, 92 and 101 of the record of appeal where the five witnesses, respectively, ended their testimonies, Mr. Mwasimba demonstrated that all the testimonies were duly signed. The authorities relied

upon by his learned friend on the point, he added, were inapplicable to the instant matter.

Coming to the second ground, Mr. Mwasimba conceded that the learned trial Judge's summing up was not up to it. He agreed with his learned friend that it was a fatal non-direction that malice aforethought was not explained and urged us to take the same course of action as we did in **Theophil Haule** (*supra*). On the Court's probing regarding the appellant's defence, the learned Senior State Attorney submitted that it was also a non-direction on the part of the learned trial Judge that the nature, cogency and context in which *alibi* could be applied were not addressed.

Rejoining, Mr. Tuthuru maintained that the substance of a testimony of a witness is the evidence in chief and that is what is required to be signed.

We have examined the record of appeal in the light of the learned submissions of the counsel and the authorities relied upon. In determining the appeal, we propose to begin with the alleged omission by the learned trial Judge to authenticate the testimonies she recorded.

At the forefront, we agree with the learned counsel that in **Sabasaba Enos** (*supra*) and **Yohana Mussa Makubi** (*supra*), the Court underlined in

imperative terms that a presiding Judge must append his or her signature after recording the testimony of each witness so as to authenticate the testimony so recorded. Non-compliance with that requirement cannot be glossed over; it is incurable.

In the instant case, Mr. Tuthuru's complaint is that the learned trial Judge omitted appending her signature at "the end of the testimony" of every prosecution witness, which he said was the end of the evidence in chief. We think this is a clear misconception of the direction in **Sabasaba Enos** (*supra*) and **Yohana Mussa Makubi** (*supra*). The Court did not say in these cases that the trial Judge must append his or her signature at the end of the evidence in chief of every witness but at the end of the testimony of the witness. Given that the process of testifying in court is governed by section 146 (1) of the Evidence Act, Cap. 6 R.E. 2002 (now R.E. 2019) ("the TEA") by which a witness may be examined in three stages, a testimony of a witness would end after the last stage is accomplished. For clarity, we reproduce the aforesaid provision thus:

> *"146.-(1) The examination of a witness by the party who calls him is called his examination-in-chief.*

(2) The examination of a witness by the adverse party is called his cross-examination.

(3) The examination of a witness, subsequent to the cross examination, by the party who called him is called his re-examination."

Certainly, in terms of sections 176 and 177 of the EA, the presiding Judge and the assessors are, respectively, empowered to put questions to a witness. Since by practice, such questions are put to a witness after he or she is re-examined, we are of the firm view that after such questions, if any, the presiding Judge must append his signature to authenticate the testimony.

In the instant case, we examined pages 71, 80, 84, 92 and 101 of the record of appeal which Mr. Mwasimba invited us to look at. Having done so, we now confirm that the testimonies of the five witnesses were duly signed by the learned trial Judge at the end of each testimony. We would, therefore, dismiss the first ground of appeal.

Coming to the second ground, we begin by noting the convergence of the submissions by the learned counsel that the learned trial Judge's summing up was irregular and that it rendered the trial unfair, hence a nullity. Nonetheless, we are enjoined to interrogate and determine whether the summing up was, indeed, irregular and, if so, whether it vitiated the trial.

At the outset, we wish to reaffirm the peremptory requirement under section 265 of the Criminal Procedure Act, Cap. 20 R.E. 2002 (now R.E. 2019) ("the CPA") that criminal trials before the High Court must be conducted with the aid of at least two assessors. In addition, a trial Judge sitting with assessors is required by section 298 (1) of the CPA to sum up the case to the assessors before inviting their opinion. Section 298 (1) of the CPA provides that:

> *"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."* [Emphasis added]

We have added emphasis to the above phrase "the judge may sum up the evidence" to accentuate the settled position that although the word "may" ordinarily connotes discretion, it has been interpreted as imposing a mandatory duty on the trial Judge to sum up the evidence. Indeed, the Court echoed that position in **Mulokozi Anatory v. Republic**, Criminal Appeal No. 124 of 2014 (unreported):

> *"We wish first to say in passing that though the word 'may' is used implying that it is not mandatory for the*

trial judge to sum up the case to the assessors ***but as a matter of long established practice and to give effect to s. 265 of the Criminal Procedure Act*** *that all trials before the High Court shall be with the aid of assessors,* ***the trial judges sitting with assessors have invariably been summing up the cases to the assessors.***" [Emphasis added]

When summing up, it is the duty of the trial Judge to explain all the vital points of law in relation to the relevant facts of the case – see **Omari Khalfan v. Republic**, Criminal Appeal No. 107 of 2015 (unreported) and **Said Mshangama @ Senga v. Republic**, Criminal Appeal No. 8 of 2014 (unreported). In the unreported decision of **Masolwa Samwel v. Republic**, Criminal Appeal No. 206 of 2014, the Court, having noted that the learned trial Judge omitted to address the assessors in a murder trial on the voluntariness of a confessional statement and the defence of *alibi*, held that:

"There is a long and unbroken chain of decisions of the Court which all underscore the duty imposed on trial High Court judges who sit with the aid of assessors, to sum up adequately to those assessors on ***'all vital points of law.'*** *There is no exhaustive list of what are the vital points of law which the trial High Court should*

address to the assessors and take into account when considering their respective judgments."

In **Andrea Ngura v. Republic**, Criminal Appeal No. 15 of 2013 (unreported), we underlined that the value of assessors' opinions is dependent upon how informed they are:

> *"Trial by assessors is an important part in all the trials of capital offences in Tanzania. Although, in terms of section, 298(2) of the CPA their opinions are not binding on the trial judge,* ***the value of their opinions very much depends on how informed they could be.***"[Emphasis added]

In the instant case, we subscribe to the concurrent submission by the learned counsel that the learned trial Judge's summing up to the assessors was clearly irregular. First and foremost, it is evident from the summing up notes from pages 132 to 149 of the record of appeal that the learned trial Judge mainly summarized the facts of the case. It is only towards the end of the notes, at page 148, that the learned trial Judge charged the assessors to determine if the prosecution discharged its duty to prove that the appellant killed the deceased with malice aforethought. Unfortunately, the learned trial Judge did not address the assessors what that concept entails and what its

ingredients are. Despite not doing so, she addressed the issue, as she must have, in her judgment as shown from pages 205 to 208. We note from pages 150 and 151 of the record of appeal that the assessors unanimously returned the verdict of guilty against the appellant but none of them was able to say if the killing was committed with malice aforethought.

As regards the defence of *alibi*, it is evident that apart from the learned trial Judge summarizing the learned defence counsel's closing submission on the appellant's *alibi*, as shown at page 143 to 145 of the record of appeal, she said nothing on the essence of that defence as well as the underlying burden of proof. Nor did she stress that conviction could not be entered without considering that defence. It is, therefore, unsurprising that in giving the opinions, none of the assessors considered any aspect of the appellant's *alibi*.

In view of the non-directions committed in the summing up as canvassed above, we are constrained by the law to hold that the appellant's trial was unfair because it cannot be said to be one conducted with the aid of assessors as envisaged under section 265 of the CPA. The trial was, therefore, a nullity. In consequence, we find merit in the second ground of appeal.

The upshot of the matter is, therefore, that we allow the appeal and proceed to nullify the trial proceedings and the decision thereon. Consequently, we remit the case to the High Court for a retrial before a new Judge and a different set of assessors.

DATED at **MWANZA** this 13th day of July, 2021

G. A. M. NDIKA
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

The Judgment delivered this 13th day of July, 2021 in the presence of the Appellant in person linked via video conference at Butimba Prison and Ms. Maryasinta Lazaro, Senior State Attorney for the respondent/Republic is hereby certified as a true copy of the original.

G. H. Herbert
DEPUTY REGISTRAR
COURT OF APPEAL