

**IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA**

(CORAM: MWARIJA, J.A., KITUSI, J.A., And KEREFU, J.A.)

CRIMINAL APPEAL NO. 247 OF 2017

MOHAMED SELEMANI KIDARI @ NOWATA APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Arusha)

(Opiyo, J.)

dated the 29th day of May, 2017

in

Criminal Session Case No. 11 of 2016

JUDGMENT OF THE COURT

23rd & 25th February, 2021

KITUSI, J.A.:

The High Court of Tanzania, Arusha District Registry convicted the appellant with Murder under section 196 of the Penal Code [Cap. 16 R.E. 2002] and imposed on him the mandatory death sentence. This is an appeal against both the conviction and sentence.

At the trial, it was alleged that the appellant killed one Shaibu Ramadhani, a motorcyclist commonly known as *bodaboda*. There was evidence from one Nyange Shabani (PW2), also a *bodaboda* man, that while he was at their operating centre (*kijiwe*) with Juma Swalehe, Juma

Stoo, Samwel and the deceased, a tall and slightly brown person approached the deceased for transport service and the two left on the deceased's motorcycle. Shortly later, PW2 also got a passenger and drove off.

When PW2 was driving back to the centre, he ran into two people driving a motorcycle towards where he was driving from, and at that moment he ignored them and drove on. But about 5 km ahead he found a person lying by the roadside. He stopped and approached the person, only to realize it was the deceased bleeding and unable to speak. Since PW2 could not do anything on his own to help the wounded man, he hurried to the centre where he found Adam, who happened to be of the same tribe as the deceased. When PW2 informed Adam about what he had seen, Adam went to inform the deceased's uncle, (PW1).

As PW1 and some members of the *badaboda* team took the injured man to Kiteto hospital, the others including PW2 and PW3 went back to the scene in a bid to trace the transgressors. They traced the tyre marks of the motorcycle to a secluded small house. They rounded up the house with the view of forcing entry into it but those who were inside resisted by threatening them with arrows. However, when they could not resist any more the occupants of the small house bolted out of the house. PW2,

PW3 and the rest ran in pursuit of two people who had emerged from the small house. They managed to apprehend one of them who turns out to be the appellant.

The search team went back to the house after apprehending the appellant, where they found the motorcycle that the deceased had been using immediately before being attacked. PW4, the appellant's half brother, testified that the appellant in the company of a stranger who was not apprehended, arrived at his home at night with the motorcycle and told him it had developed mechanical problems. They wanted to spend the night there, but the search team invaded them that very night.

There is evidence from PW5, the deceased's father, that his son subsequently died as a result of the injuries caused, and that led to the appellant being charged with his murder.

In defence the appellant admitted to have arrived at PW4's house in the company of the man who had given him a ride on the motorcycle. When the motorcycle developed mechanical defects, he and the owner pushed it to PW4's home to get shelter for the night but to his surprise the night ended in misery as alluded to above.

Satisfied that the case for the prosecution had been proved beyond reasonable doubt, and that the appellant's defence did not raise

reasonable doubt, the High Court convicted and sentenced the appellant as earlier shown.

The appeal raises several grounds to challenge the decision of the High Court. The appellant, who was linked by video from Arusha Central Prison, was represented by Mr. John Materu, learned advocate who was in Court. The respondent Republic appeared through Ms. Janeth Sekule and Sabina Silayo, both learned Senior State Attorneys and Ms. Mary Lucas, learned State Attorney. They were opposed to the appeal.

However, before the parties could address the grounds of appeal, we drew their attention to the trial court's summing up notes and invited them to address us on the adequacy or otherwise of those notes.

Mr. Materu was candid. He briefly submitted that in the summing up, the learned trial Judge did no more than summarize the evidence for both sides, without directing the assessors to the vital points on a number of areas. Submitting, the learned counsel pointed out that the trial Judge did not elaborate to the assessors on the ingredients of the offence of murder and what the prosecution required to prove in the case. The learned advocate referred to the judgment in which the trial judge discussed and relied on circumstantial evidence, evidence of visual identification and doctrine of recent possession none of which, he

submitted, featured in the summing up. Mr. Materu argued that even the opinion of one of the assessors shows that he did not know what it was expected of him.

On the other hand, Ms. Sekule was also brief but to the point, submitting that apart from mentioning that the case was based on circumstantial evidence, there was nothing more from the learned Judge. She supported Mr. Materu's submission that the assessors were not directed on what it meant by the doctrine of recent possession which the learned judge applied in her judgment. She pointed out the fact that in the judgment, the trial court took into account the appellant's conduct, an aspect that was not mentioned during the summing up.

Ms. Sekule concluded by submitting that the assessors gave uninformed opinions, so she prayed for an order of retrial to be made in the interest of justice. Mr. Materu did not resist the prayer for an order of retrial because in his view, the justice of the case demands so.

In our consideration of the arguments presented by the learned appellant's counsel and supported by the learned Senior State Attorney, we begin by acknowledging that involvement of assessors in trials before the High Court is a statutory requirement as per section 265 of the Criminal Procedure Act, [Cap. 20 R.E. 2002] (the CPA).

It provides: -

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

This statutory requirement has been interpreted by the Court as giving to the trial courts the duty to sum up the case to the assessors for them to give informed opinions. Such cases include **Tulubuzya Bituro v. Republic** [1982] TLR 265, **Said Mshangama @ Singa v. Republic**, Criminal Appeal No. 8 of 2014 and **DPP v. Revelian Naftali & Marick Emmanuel**, Criminal Appeal No. 570 of 2017 (both unreported). In **Said Mshangama** (supra) we affirmatively stated:

"As provided under the law, a trial of murder before the High Court must be with the aid of assessors. One of the basic procedures is that the trial Judge must adequately sum up to the said assessors before recording their opinions. Where there is inadequate summing up, non-direction or misdirection on such a vital point of law to assessors, it is deemed to be a trial without the aid of assessors and renders the trial a nullity."

In our case, as correctly argued by Mr. Materu learned counsel for the appellant and supported by Ms. Sekule, learned Senior State Attorney, the learned trial Judge's summing up to the assessors was, with respect,

quite inadequate. For, not only did she omit to direct to the assessors the ingredients of the offence of murder as required but she did not direct to them some principles that were discussed in her judgment. Such principles are like circumstantial evidence, doctrine of recent possession evidence of visual identification and the accused's conduct. These being technical legal points should have been explained to the lay members of the court for them to actively participate in the decision.

As held in the case of **Mshangama** (supra) the Judge's omission to do so rendered the proceedings a nullity because it is then deemed that the case proceeded without the aid of assessors in violation of the mandatory provision of section 265 of the CPA. Ms. Sekule prayed for an order quashing the proceedings and judgment and directing a retrial. As we indicated earlier, Mr. Materu had no objection to the prayer for a retrial based in the interest of justice.

We are respectfully in agreement with the learned counsel for the appellant and the learned Senior State Attorney that the omission to direct the assessors to the points of law that finally formed the basis of the Judge's decision, was fatal to the entire proceedings. Consequently, we invoke our revisional powers under section 4 (2) of the Appellate Jurisdiction Act, [Cap. 141 R.E. 2002] and nullify the proceedings, quash

the judgment of the High Court and set aside the sentence imposed on the appellant. We order a retrial before another Judge and a different set of assessors as soon as possible.

In the meantime, the appellant shall remain in custody.

DATED at **ARUSHA** this 24th day of February, 2021.

A. G. MWARIJA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL



R. J. KEREFU
JUSTICE OF APPEAL

The Judgment delivered this 25th day of February, 2021 in the presence of the appellant in person linked by Video Conference from Arusha Central Prison and represented by Mr. Mitego Methusela, learned Advocate holding brief for Mr. Materu, learned Advocate and Ms. Amina Kiango, 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