IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MKUYE, J.A., WAMBALI, J.A. And GALEBA, J.A.)

CRIMINAL APPEAL NO. 121 OF 2019

JOSEPH JOSEPH KOMBA @ JANTA } .....1ST APPELLANT
NASSORO SEIF JONGO @ KAJUMULO @ KAJU } .....2ND APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Luvanda, J.)

dated the 28th day of March, 2019
in
(HC) Criminal Sessions Case No. 32 of 2014

.....

JUDGMENT OF THE COURT

24th May & 5th August, 2021

MKUYE, J.A.:

The appellants Joseph Joseph Komba @ Janta and Nasoro Seif Jongo @ Kajumulo (the first and second appellants respectively) together with two others who were acquitted in this case, were charged and convicted with the offence of murder contrary to section 196 of the Penal Code, Cap.16, R.E. 2002 [Now R.E. 2019] by the High Court of Tanzania (Luvanda, J.) at Dar es Salaam in Criminal Sessions Case No. 32 of 2014. Upon conviction the appellants were sentenced to a mandatory sentence of

death by hanging. Aggrieved, the appellants have preferred this appeal to this Court.

It is noteworthy that, initially, this matter was dealt with by this Court on revisional proceedings instituted by the appellants on account that it was wrongly transferred to the Resident Magistrate's Court after plea taking had been conducted by the High Court. The Court, having been satisfied of the anomaly, nullified the proceedings of the High Court and ordered the trial to proceed (page 54 of the record of appeal).

The brief background of the case leading to this appeal is as follows:

On 10/12/2008, Erasmos Gorge Cristas (PW3) was in company of Serafine Madenge (deceased) on their way to deposit money to the Bank. They were moving from Magomeni Gapco Petro Station with a motor vehicle. As they moved towards Kawawa Road, they were invaded by persons unknown to them who blocked their motor vehicle while wielding a gun and demanding that they hand over the money in their possession.

According to PW3, one of the thugs shot directly at them and the deceased alighted from the motor vehicle running away from bandits with one of the bags containing the money. On seeing him running, the bandit who had a gun shot the deceased several times and he fell on the ground.

The bandits took the bag of money and left hurriedly in a car they came with towards Manzese direction. Meanwhile, Benson William Mkweja (PW9) testified to have witnessed the incident and identified the appellants at the scene of crime at a distance of 25 meters from where the incident took place.

The deceased was rushed at the Magomeni Police Station where the PF3 was issued and went to Muhimbili Hospital where upon examination by the doctor he was pronounced dead.

The police commenced investigations which led to the arrest of the appellants and their accomplices from various places within Dar es Salaam Region upon receiving information that they were involved in the said robbery.

The 2nd appellant recorded an extra judicial statement (Exh P2) in which he mentioned the 1st appellant and others as his accomplices in the crime.

In convicting the two appellants, the trial court relied on the evidence of Benson William Mkweja (PW9) who testified to have witnessed the incident and identified the appellants. It further relied on the extra judicial statement of the 2nd appellant in which he confessed participation to the

crime while mentioning his accomplices, the 1st appellant inclusive. However, it acquitted the 3rd and 4th accused persons for lack of sufficient evidence.

The appellants have appealed to this Court while fronting a joint memorandum of appeal consisting 13 grounds for the 1st appellant and 8 grounds for the 2nd appellant. However, for a reason to become apparent shortly, we do not wish to reproduce them since, we think, there is an issue of point of law which needs to be addressed first.

At the hearing of this appeal, the Court invited the parties to address it on the issue of involvement of assessors on whether the trial judge in summing up summarized the evidence to the assessors and whether he explained to them the vital elements of law in the case.

Mr. Mashaka Ngole, the learned counsel who represented the appellants readily conceded that the trial judge did not direct the assessors on vital points of law. He mentioned such points of law including the ingredients of *mens rea*, direct or circumstantial evidence, the identification parade evidence and the repudiated extra judicial statements and its effects. He argued that, the trial judge ought to have explained to the assessors the implication of the repudiated extra judicial statement.

The learned counsel went on submitting that, during the trial, the number and names of assessors changed. He pointed out that at page 199 of the record of appeal one of the assessors was absent because of bereavement and the hearing of the case continued in his absence. However, at page 205 of the record of appeal, the defence case proceeded in the presence of all assessors. Yet, during the summing up, though the record of appeal shows three (3) assessors were present, one of them by the name of Bakari Lugome was not among the assessors who participated in this case from the beginning.

These shortcomings, he submitted, indicate that the assessors were not properly involved in the trial of this case. He said, this is also reflected in the record of appeal as in most instances they did not even ask questions for clarification from witnesses.

In the premises, it was Mr. Ngole's submission that the omission was fatal as it vitiated the proceedings. He said, the omission rendered the proceedings a nullity with the effect of nullification of the proceedings and judgement, quashing the conviction and setting aside the sentence.

Mr. Ngole went on submitting that in such a situation, an order for retrial would follow. However, this option was not viable in this case as the

case was not proved beyond reasonable doubt. For instance, he pointed out that, the identification evidence was marred with anomalies; the witnesses, that is, PW3 and PW9 contradicted themselves; the identification parade evidence to identify 1st appellant was insufficient; and that the extra judicial statement of 2nd appellant was recorded in contravention of the law and that it was not signed as shown at pages 3, 4 and 7 of the said extra judicial statement. He referred us to the case of **Oscar Josiah v. Republic**, Criminal Appeal No. 441 of 2015 (unreported) where the Court expunged the appellant's wife's cautioned statement for having been not signed on the second page of it.

The learned counsel further assailed the extra judicial statement in that the justice of peace did not satisfy himself as to the condition of the appellant before recording it and that the same was not listed during committal proceedings.

As to the proprietness of the identification parade, the learned counsel contended that it was not properly conducted. He explained that Benson Mkweja (PW9) testified how the same was conducted and that it comprised of persons who were short, tall, small while PW2 said it comprised of people of similar size. But again, PW9 at one point said the

1st appellant wore clothes and was asked to change his clothes if he needed, however, at another stage the same PW9 said the appellant was bear chest including others had (bear chests). Mr. Ngole went on to submit that PW3 and PW9 gave contradictory evidence in relation to the person who shot the deceased because while PW3 said that person was short and fat, PW9 said he did not recall the one who short the motor vehicle. Another contradiction was that while PW3 said the deceased set on the left front seat, PW9 said he sat on a rear seat. Another area which the learned counsel challenged is that Dr. Emael Zebadra Moshi (PW11) said the deceased was killed by a triangular metal which was found in his stomach which created doubt if he was really fired by bullet.

On her part, Ms. Gloria Mwenda assisted by Ms. Rachel Balilemwa learned State Attorneys who appeared for the respondent Republic also readily conceded to the fact that the trial judge did not direct the assessors on what they were required to do. She elaborated that the trial judge did not explain the ingredients of the offence of murder and how they relate with evidence adduced; and that the repudiated extra judicial statement was not explained to assessors. The learned Senior State Attorney also

conceded to the varying number of assessors including the involvement of assessor Bakari Lugome who was a new assessor in this case.

As to the way forward, she argued that due to the said shortcomings they would have prayed for a retrial but they cannot do so as the evidence was not watertight.

In elaboration, she assailed the evidence of PW8 and PW10 together with the extra judicial statement that they were not listed during the committal proceedings. She pointed out that PW8 was added irregularly in contravention of section 289 (2) of the Criminal Procedure Act, Cap. 20 R. E. 2002 [now R. E. 2019] requiring the witness to be added to be shown in the notice in writing together with the substance of his/her evidence. In this regard she implored the Court to expunge the evidence of PW8 and PW10 together with the extra judicial statement that was relied upon in convicting the 2nd appellant.

As to the 1st appellant, she argued that he was convicted through direct evidence of PW9. However, she said, his evidence is contradictory as to whether he really identified him or not. She elaborated that whereas PW3 testified that the victim was short while he was running away with money, PW9 said he was shot while in the motor vehicle. As such, she

submitted that the benefit of doubt should be resolved in favour of the appellant.

The learned State Attorney also raised concern on the contradicting evidence PW2 and PW9 on the type of persons who were lined up in the identification parade which was contrary to the PGO 232 requiring people of similar features in the parade and the manner the same was conducted. But more importantly, she said, PW9 said that he did not give a description of the accused before he identified him in the identification parade. Ms. Mwenda was of view that these shortcomings were fatal as they go to the root of the matter and cannot be cured. She, thus, urged the Court to allow the appeal and release the appellants forthwith from prison.

In view of what was submitted by Ms. Mwenda, Mr. Ngole had nothing to add.

We have examined the record of appeal and the submissions from either side and, we think, the issue for our determination is whether the trial judge's summing up to assessors was flawn and if this issue is answered in the affirmative, what would be the way forward.

We wish to begin by restating that it is a requirement of law for all trials in the High Court to be conducted with the aid of assessors. This is provided for under section 265 the CPA which states as follows:-

> *"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 position was also underscored in the case of **Charles Karamji @ Masanga and Another v. Republic,** Criminal Appeal No. 34 of 2016 (unreported) where it was stated:-

> *"....in terms of the dictates of the provisions of section 265 of the Criminal Procedure Act, Cap 20 of the Revised Edition, 2002 (hereinafter referred to as the CPA), all criminal trials before the High Court are mandatorily conducted with the aid of assessors the number of whom shall be two or more as the court may find appropriate."*

It is further noteworthy that in terms of section 298 (1) and (2) of the CPA the trial judge is enjoined after both sides have closed their case to sum up the evidence for the prosecution and defence before requiring the assessors to give their opinions orally as to the case generally or to any

specific question of fact addressed to them by the trial judge and such opinion are required to be recorded. Although section 298 (1) may not seem to impose a mandatory requirement for the trial judge to sum up the case to the assessors, it is now a well-established practice that a trial judge has to comply with so as to give effect to the provisions of section 265 of the CPA. This position was taken in the case of **Mulokozi Anatory v. Republic,** Criminal Appeal No. 124 of 2014 (unreported), where the Court stated as follows:-

> *"....as a matter of a long-established practice and to give effect to section 265 of the 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..."*

It is further noteworthy that in order for the opinions of the assessors to be of importance to the trial judge who is being aided by assessors, the trial judge is required to ensure that the facts of the case are understood by the assessors as well as how they relate to the laws involved. Thus, the trial judge has to ensure that the facts of the case and the relevant laws are adequately and sufficiently explained to the assessors. This position

was underscored in the case of **Michael Kazanda @ Kaponda and 2 Others v. Republic,** Criminal Appeal No. 374 of 2017 (unreported), where the Court while citing the case **Mbalushimana Jean – Marie Vianney @ Mtokambali v. Republic,** Criminal Appeal No. 102 of 2016 (unreported) which made reference to the decision of the erstwhile East African Court of Appeal in **Washington Odindo v. Republic** (1954)21 EACA 392, it had this to say:-

> *"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 assessor's opinion is correspondingly reduced" - (See also* ***Kato Simon and Another v. Republic,*** *Criminal Appeal No. 180 of 2017 (unreported).*

For similar position see also **Fadhili Juma and Another v. Republic**, Criminal Appeal No. 567 of 2015; **Charles Karamji @ Masangwa and Another v. Republic**, Criminal Appeal No. 34 of 2016; **Michael Maige v.**

Republic, Criminal Appeal No. 153 of 2017 and **John Mlay v. Republic,** Criminal Appeal No. 216 of 2007 (all unreported).

As to the consequences of failure to explain to the assessors the vital points of law, it has been held in numerous decisions that it renders the proceedings a nullity. Among those decisions is the case of **Said Mshangama @ Senga v. Republic,** Criminal Appeal No. 8 of 2014 (unreported) where the Court held that:-

> *"Where there is inadequate summing up, non-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."*

In this case, having examined the judgment of the trial court, we observed that the appellants were convicted of the offence of murder on the basis of identification evidence and repudiated extra judicial statement of the 2nd appellant as shown at pages 292, 293 and 294 of the record of appeal as was rightly argued by both counsel. Although the appellants were charged with an offence of murder, the trial judge after having summarized the evidence of prosecution and defence as reflected at pages 250 – 256 of the record of appeal did not explain the ingredients of the

offence of murder to the assessors. A part from that much as the extra judicial statement was relied upon by the trial judge in his determination, there is nowhere in the record of appeal where the trial judge addressed the assessors on the retracted/repudiated extra judicial statement and its applicability in the situation where it was retracted. Nor did he explain the visual identification evidence and how it can be relied in the case. Moreover, in the determination of the case the doctrine of recent possession was relied upon to connect both appellants but the same was not explained to the assessors.

As the trial judge failed to explain such vital points of law to assessors, it could have been the reason which led them to give opinions which did not relate to the elements that related to the evidence before them. Since it is clear that he failed to do so, then as was rightly submitted by both counsel, it cannot be said that the trial of the case was with the aid of the assessors within the dictates of section 265 of the CPA. (See **Richard Siame Mateo v. Republic,** Criminal Appeal No. 173 of 2017; **Frednand s/o Kamande and 5 Others v. Republic**, Criminal Appeal No. 390 of 2017; **Omary Khalifan v. Republic**, Criminal Appeal No. 107 of 2015; **Suguta Chacha and 2 Others v. Republic**, Criminal Appeal

No. 101 of 2011 and **Mara Mafuge and 6 Others v. Republic,** Criminal Appeal No. 29 of 2015 (all unreported).

In the circumstances, we agree with both counsel that, in this case, the trial cannot be said that it was conducted with the aid of assessors. And, this was a fatal irregularity which renders the appellants' trial a nullity. (See **Frednand Kamande's** case (supra)).

On the way forward, we agree with both counsel that this is not a fit case for ordering a retrial. After having examined the evidence on the record of appeal, we have found that there is no sufficient evidence which can sustain the conviction. As we have hinted above, the trial court convicted the appellant on the basis of identification evidence of PW9 that he identified the 1st appellant. However, as was rightly pointed out by both counsel PW9 gave a contradictory and incredible evidence which raises doubt as to whether he really identified him or not. There is also a contradictory evidence between PW3 and PW9 as to where the victim was shot whether it was inside the motor vehicle or outside the vehicle while the victim was running away with money. That apart, the identification parade on which the 1st appellant was allegedly identified was marred with irregularities as the persons who were lined up were not of similar features

and exchanged clothing in the presence of the identifying witness. As regards the repudiated extra judicial statement of the 2nd appellant, it did not escape anomalies as the same together with PW8 who tendered it in court were not listed during committal proceedings. Nor was there any notice to call an additional witness issued under section 289 of the CPA showing the substance of the evidence to be adduced in court. Hence, the extra judicial statement (Exh P4) was irregularly admitted and ought to be expunged.

Under normal circumstances, since we have found that the trial was a nullity, we would have exercised our revisional powers under section 4(2) of the AJA to nullify the proceedings and make an order for a retrial. However, given the nature of this case that the evidence is not sufficient to sustain the conviction, we think, doing so may provide an opportunity to the prosecution to fill up gaps as was held in **Fatehali Manji v. Republic,** [1966] E.A. 343.

Since this issue was raised by the Court, we hereby, in terms of section 4 (2) of the AJA, nullify the proceedings and judgment, quash the conviction, set aside the sentence meted against the appellants and order

for their immediate release from custody unless held for other lawful reason(s).

It is so ordered.

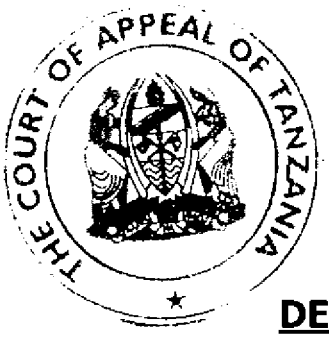
DATED at **DAR ES SALAAM** this 3rd day of August, 2021.

R. K. MKUYE
JUSTICE OF APPEAL

F. L. K. WAMBALI
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

The Judgement delivered this 5th day of August, 2021 in the presence of the appellant in person through Video facility and Ms. Imelda Mushi, learned 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