IN THE COURT OF APPEAL OF TANZANIA

AT SHINYANGA

(CORAM: WAMBALI, J.A., LEVIRA, J.A. And KAIRO, J.A.)

CRIMINAL APPEAL NO. 38 OF 2018

MASHAKA JUMA NTALULA ..... APPELLANT

VERSUS

THE REPUBLIC .... RESPONDENT

[Appeal from the judgment of the High Court of Tanzania at Shinyanga]

(Kibella, J.)

Dated the 16th day of June, 2017

in

Criminal Sessions Case No. 36 of 2016

.....

JUDGMENT OF THE COURT

11th & 18th August, 2021

LEVIRA, J.A.:

Mashaka Juma Ntalula (the appellant) has undergone a peculiar experience before the Court after his first appeal to the Court (Criminal Appeal No. 159 of 2015) ended up with a retrial order which later was not accordingly complied with by the court below. In the said appeal, the Court (Luanda, Massati and Mugasha, JJ.A.) having found that the trial High Court (Korosso, J. as she then was) allowed the assessors to cross examine the witnesses during trial of the appellant on a murder charge, nullified all proceedings, quashed conviction and set aside the

sentence. It ordered immediate retrial of the appellant before another judge with a different set of assessors.

Following the decision of the Court, the appellant was retried and convicted by the High Court of Tanzania at Shinyanga (Shinyanga Registry) sitting at Kahama (Kibella, J.) of murder of one Nshimba Ntalula @ Charles. He was sentenced to suffer death by hanging. Dissatisfied, he has lodged this appeal against the conviction and sentence.

It is on record of appeal that the appellant and the deceased were related. On the material day, that is 1st September, 2009 at or about 17:00 hours the appellant asked the deceased to take him to Nyavino Igwamanoni village with a view of showing him where he was living. According to Helena Masanja (PW1) who was the wife of the deceased, her husband accepted the invitation by the appellant and he promised to return home after a day, a promise which was also made to Ephraim Nyinza (PW7). The two travelled by a motorcycle with Reg. No. T 832 AZG, the property of the deceased. However, the deceased did not return home as he promised. PW1 tried to trace him through a mobile phone but in vain. On 3rd September, 2009 PW1 communicated with the appellant through mobile phone who informed her that they got an

accident on their way to Nyavino Igwamanoni Village and Nshimba (the deceased) was at Masumbwe Police Station. PW1 went to the said police station to check on her husband. Upon arriving there, she was told by SP Shabu Benevenuto Shabu (PW2) that there was no report of such an accident. PW1 continued to make efforts to trace her husband and on 12th September, 2009 while at Mkweni forest (the scene) with the policemen including PW2 and the appellant, is when he (the appellant) told them that he murdered the deceased at that forest. The appellant's confession on murder incident was also made before Hermes Byarugaba (PW9) a justice of peace.

At the scene they found a machete, a jaw bones, vest and jacket. PW1 was able to identify the vest and jacket to be the properties of the deceased. It was PW1's further evidence that the house of the appellant was searched by the police and some of the deceased belongings were recovered, including, a long and short pair of trousers. Those items were seized by the police. Thereafter, PW2 took the bones found at the scene of crime to the hospital for examination and Dr. Mahulu established that they were of the human being. PW2 decided to send those bones together with other exhibits and samples to the Chief Government Chemist for DNA test where Gloria Tom Machuve (PW3) made the test

and the conclusion was that they related to the deceased. As regards the motorcycle of the deceased, Lukunja Lukundula (PW4) told the trial court that the said motorcycle was sold to him by the appellant in exchange of six heads of cattle having failed to sell it to Peter Mkono (PW8), who said did not have money to buy it. Simeo Philipo (PW5) a VEO of Kipungu village testified that he was informed by PW4 that he (PW4) bought the said motorcycle from the appellant.

PW8 testified further that he ended receiving a pair of shoes as a gift from the appellant which later on came to be identified as a deceased's property. The case was investigated by retired Police Officer No.C.9895 D/SSGT Laurent (PW6) and No. F.1689 D/CPL Steven (PW10) who facilitated recovery of the deceased's motorcycle.

In his defence the appellant (DW1) did not deny the fact that on the material day he left with the deceased on the deceased motorcycle to his home. However, he insisted that on the way they got an accident at scene of crime and thus he went to the nearby village to fix the motorcycle leaving behind his uncle (the deceased) in that forest. Upon return, he did not find the deceased where he left him and thus he thought that the deceased was attacked and killed by wild animals. The appellant did not deny selling the deceased's motorcycle to PW4. Upon a

full trial, the High Court convicted and sentenced the appellant as introduced above, hence, the current appeal. In this appeal the appellant has raised six grounds which we shall not reproduce due to reasons to be exposed shortly.

At the hearing of this appeal, the appellant who appeared in person was represented by Mr. Audax Constantine, learned advocate, while the respondent Republic had the services of Mr. Jukael Reuben Jairo and Nestory Mwenda, both learned State Attorneys.

Mr. Constantine rose and prayed to the Court under Rule 81(1) of the Tanzania Court of Appeal Rules, 2009 as amended (the Rules) at the outset that he be allowed to add a new ground of appeal on a legal point before arguing the grounds of appeal appearing in the Memorandum of Appeal. As there was no objection from the respondent's side, the Court granted him leave.

Mr. Constantine commenced his submission by stating that while he was in preparation of the hearing of this appeal, he discovered that the trial court did not comply with the requirements of section 298 (1) of the Criminal Procedure Act, Cap 20 R.E. 2019 (the CPA) in summing up to assessors. He referred us to pages 79 to 83 of the record of appeal

and argued that the trial judge did not summarize to assessors the evidence adduced by both sides during trial. He said, at page 80 of the record of appeal, the trial judge summarised what he termed as *"facts requiring proof"* in the alphabeted paragraphs (a) to (f). Specifically, he referred us to paragraph "(c)" where the trial judge was referring the assessors to the evidence of prosecution witnesses without summarizing it to them.

Apart from that, Mr. Constantine argued further that, the learned trial judge failed to direct the assessors on vital points of law that cropped up from the evidence on record; for instance, the appellant's defence of alibi, the doctrine of recent possession, confession, search and seizure and cause of death. To support his arguments, he cited the case of **Lubinza Mabula and 2 Others v. Republic,** Criminal Appeal No. 226 of 2016 (unreported).

Basing on the above decision, Mr. Constantine urged us to find that the trial in the current case ended up without the aid of assessors and the decision of the High Court was a nullity. He implored us to exercise our revisionary powers under Section 4 (2) of the Appellate Jurisdiction Act, Cap 141 R.E. 2019 (the AJA) to nullify everything that was done by the trial court and order a retrial before another judge and

a different set of assessors. He concluded by stating that there was no need for him to address the Court on the rest of the grounds of appeal.

Despite the admission that he has not come across any decision of the Court requiring a trial Judge to summarize evidence to assessors, Mr. Mwenda concurred with the submission by Mr. Constantine. He added that the evidence on record is sufficient to ground appellant's conviction should the Court order a retrial. Therefore, he urged us to revise the proceedings of the trial court from summing up to assessors up to the judgment and order a retrial only in respect of the identified part. Mr. Constantine had no rejoinder to make having seen that the respondent's side concurred with his submission.

We have carefully considered the submissions by both sides and the record of appeal. The only issue calling for our determination is whether the trial court summed up the case to assessors properly. We wish to state at the outset that it is a mandatory requirement of the law under section 265 of the CPA that all trials before the High Court are conducted with the aid of assessors. It reads: -

> *"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."*

In the current appeal there is no doubt that the trial court sat with assessors during trial. However, it is important to note that, the trial court has an obligation to ensure that assessors make a thorough follow up of the proceedings during trial to enable them make a meaningful opinion after closure of parties' evidence. In discharge of this obligation, a trial judge is a required under Section 298 (1) of the CPA to sum up the evidence to assessors before affording them an opportunity to give their opinions with a view of enabling them to give informed opinions. This section provides as follows: -

> *"298.- (1) 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].

The above provision uses the word "may" in imposing obligation to the trial judge of summarising evidence. The word 'may' in its ordinary meaning connotes discretion. However, it should be noted that section 298 (1) of the CPA is not a lone provision as far as summing up to assessors is concerned. It has to be read together with section 265 of the CPA quoted above which makes it a mandatory requirement that,

the High Court sits with assessors during trial. In the same spirit, the Court has kept on emphasizing on the necessity of summarising evidence to assessors for them to be acquainted with the substance or gist of the evidence before giving their opinions. This position has its genesis in the case of **Hatibu Gandhi and Others v. Republic** (1996) T.L.R. 21 where among other things, the Court stated that: -

> *"... It is sufficient for the trial judge to state the substance or gist of the case on both sides to enable the assessors' opinions to be formed on the case in general or on any particular point required."*

From the above position, jurisprudence has been developed and now it is settled position that section 298 (1) of the CPA imposes as a mandatory requirement for the trial judge to summarise the substance of the evidence to the assessors. Some of the decisions of the Court to that effect include the case of **G.2573 PC Pacificus Cleophance Simon v. Republic,** Criminal Appeal No. 484 of 2016; **William Safari @ Kayda v. Republic,** Criminal Appeal No.37 of 2017; **Elly Millinga v. Republic,** Criminal Appeal No.362 of 2018 and **Daniel Ramadhan Akilindi @ Abdallah @ Dulla v. Republic**, Criminal Appeal No.16 of 2019 (all unreported). In **G.2573 PC Pacificus** (supra) the Court quoted a Kenyan case of **Kitsao v. R** [2007] 2 EA 252 where the Court

of Appeal of Kenya when dealing with sections 262 and 322(1) of the Kenyan Criminal Procedure Code which is *pari materia* with our sections 265 and 298(1) of the CPA stated as follows: -

> *"Although by its use of the word* ***"may"*** *the above provision gives the court discretion to sum-up the evidence to the assessors before requiring the assessors to state their opinions, by usage and case law, summing up to assessors is no longer a discretionary matter, for if the court requires the assessors to be of any use to it, the assessors must make informed opinions which they can only do upon* ***the court summing-up the entire evidence to them and at the same time directing them on issues of law;*** *that the summing up must not only be done but must be seen to be done. Summing-up to the assessors has gained the force of law and is now a must."* [Emphasis added].

Also, in **Andrea Ngura v. Republic,** Criminal Appeal No. 15 of 2013 (unreported) the Court stated that: -

> *"...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 judge, the value of their opinions very much depends on how informed they could be ...."*

The trial judge in the current appeal failed to discharge his obligation under section 298 (1) of the CPA as correctly, in our view, argued by Mr. Constantine while referring us to page 80 of the record of appeal. To appreciate what was done by the trial judge, we think it is important to reproduce the relevant part of summing up to assessors hereunder:

> "*(c)* ***Who caused death***
>
> *There is no direct evidence except circumstantial evidence. Refer, evidence by PW1 Helena Masanja, PW2 SP. Shabu B. Shabu, Gloria T. Machuva (sic), PW3, Lukunja Lukundula PW4, PW5, Simeo Phiiipo, PW6 D/Ssgt Laurent, Efraim Yinza PW7, Pater Makono, PW8, Hermes Byarugaba PW9 and PW10 F. 1689 D/Cpl. Steven. As well as consider the defence by that accused that he did not concern with the killing of the deceased."*

As it can be observed from the excerpt above, the trial judge did not summarise the gist of evidence adduced by the witnesses for both parties. Instead, he referred the assessors to the names of witnesses purporting to refer them to their evidence. At any rate, without any further information from the record, it cannot be said with certainty that the substance of evidence was summarised to the assessors for them to

give informed opinion notwithstanding their opinions found in the record. With such observation, in our considered opinion since the trial judge failed to comply with the requirements of section 298 (1) of the CPA, it is as good as the trial was conducted without the aid of assessors contrary to the mandatory requirements of section 265 of the CPA which requires full participation of assessors in the trial from the beginning to the end.

In the circumstances, and having considered the peculiarity of this case, we think in the interest of justice, it is appropriate to nullify only part of proceedings of the trial court; particularly, from the commencement of the summing up to assessors by the trial judge to the end so as to pave the way for the trial court to conclude the trial properly. Consequently, we invoke our revisional jurisdiction under section 4(2) of AJA and proceed to quash the proceedings of the trial court from 5th June, 2017 when the purported summing up to assessors was conducted, quash the appellant's conviction and set aside the sentence.

We order an expedited retrial before another judge with the same assessors. In alternative, if attendance of the said assessors will not be procured due to reasons beyond control, we make further order that a

full retrial be conducted expeditiously before another judge with a new set of assessors. In the meantime, the appellant shall remain in custody pending retrial.

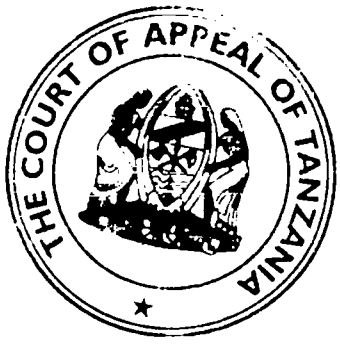
DATED at **SHINYANGA** this 16th day of August, 2021.

F. L. K. WAMBALI
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

L. G. KAIRO
JUSTICE OF APPEAL

The judgment delivered this 18th day of August, 2021 in the presence of Mr. Audax Theonest Constantine, learned counsel for the appellant and Mr. Jukael Ruben Jairo, learned State Attorney for the respondent/Republic is hereby certified the true copy original.



D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL