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. 133 OF 2019

PHILEMON ZACHARIA@ LAIZER.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Mlyambina, J.)

dated the 15th day of March, 2019
in
(HC) Criminal Sessions Case No. 96 of 2016

.....

JUDGMENT OF THE COURT

1st June & 5th August, 2021

MKUYE, J.A.:

In the High Court of Tanzania sitting of Dar es Salaam, Philemon Zacharia @ Laizer was charged with the offence of murder contrary to section 196 of the Penal Code Cap 16 RE 2002 (Now R. E. 2019). It was alleged that the appellant, on 9th June, 2013 at Mikocheni B area within Kinondoni District in Dar es Salaam Region did murder one Lucy Perpetua Maua. Upon a full trial, he was convicted as charged ((Mlyambina J,)) and was sentenced to death by hanging.

Before embarking in the merits of the appeal, we have found appropriate to narrate albeit a brief background of the case as per the record of appeal, leading to the matter at hand. It goes thus:

The deceased, one Lucy Perpetua Maua and the appellant were employees of the retired Justice of Appeal, Engera Kileo (PW1) as a housemaid and gardener, respectively. It is on record that the appellant made advances to the deceased to have a love affair, but the deceased being older than him turned down the offer. It appears that the appellant was not amused with that response. He, thus, nursed a grudge against her.

On the material date, the appellant lured the deceased into her death by concocting a story that he wanted the deceased to accompany him to the residence of his girlfriend, one, Consolata in order to reconcile them as they were in misunderstanding. Without knowing the appellant's plan, the deceased agreed. They planned to leave after other members of the family have retired to their beds/gone to sleep.

At about 00.00 hours, the appellant who had access to the family car left with the deceased and on reaching at a distance of about 400 meters from where they lived, the appellant stopped the car and

engaged the deceased on similar advances of having love affair/in a talk concerning the would be love affair. The deceased, however, maintained her previous position on the issue. Then, the appellant out of anger for failing once again in winning the heart of the deceased took a panga from the motor vehicle and cut the deceased twice at the neck area. The deceased succumbed to death and the appellant dragged her into a secluded area near a rubbish pit and left her dead body there.

The appellant hurriedly went home, entered the deceased's room and took all her belongings and hid them in his room under the bed. He then went to sleep.

In the following morning the appellant overheard from his friend that a dead body of a woman had been discovered nearby and he together with Heri Ngotiama (PW6) went to the scene of crime and later to Mwananyamala Hospital where they identified the dead body as being that of the deceased.

Later, the police became suspicious of the appellant. They searched his room and items belonging to the deceased were found. This led to the arraignment of the appellant in court as alluded to above.

In his defence, the appellant denied involvement. As alluded to earlier on, at the end of the trial, he was convicted and sentenced accordingly.

Aggrieved, the appellant has now appealed to this Court on seven (7) grounds of appeal. However, for reasons to become apparent shortly, we shall not reproduce all grounds of appeal but we will reproduce the 6th ground of appeal relating to the involvement of the assessors in the trial of this case as, we think, it suffices to dispose of the appeal without necessarily canvassing the other grounds of appeal. The said ground is to the effect that:-

> *"6. That, the learned trial Judge did not properly direct the assessors on the vital points of law which were involved in the case having in mind that the conviction of the appellant was based on the circumstantial evidence, retracted confession statement and doctrine of recent possession".*

At the hearing of this appeal, the appellant was represented by Mr. Nehemiah Nkoko, learned advocate, whereas the respondent Republic was represented by Ms. Janetreza Kitaly, learned Senior State Attorney

assisted by Ms. Faraja George and Ms. Haika Temu, learned Senior State Attorney and State Attorney, respectively.

Apart from the above ground of appeal concerning the improper involvement of assessors, Mr. Nkoko prefaced his submission by challenging the selection of assessors arguing that it was done in contravention of the law. He took us to page 32 of the record of appeal where three assessors were listed without even showing their ages. He further pointed out that the accused (appellant) was not asked by the trial judge if he had any objection to any of them to participate in the trial. He said, instead it was the learned counsel for both the prosecution and defence who were asked if they objected and they said they did not object. The learned advocate contended that non-compliance with that requirement was a fatal irregularity which vitiated the trial. In support of his argument, he referred us to the cases of **Emmanuel Stephano v. Republic,** Criminal Appeal No. 213 of 2018, **Malambi Lukwaja v. Republic,** Criminal Appeal No. 71 of 2018 (both unreported).

Apart from that, Mr. Nkoko submitted that the trial judge did not explain to the assessor their roles.

Elaborating the ground of appeal, Mr. Nkoko contended that the trial judge did not address the assessors on vital points of law which were relied upon in the determination of the case. He pointed out that, though the trial judge convicted the appellant of the offence of murder, he did not in the summing up explain to the assessors the ingredients of the offence of murder. Further to that, despite the fact that he relied on circumstantial evidence and cautioned statement (Exh P4) in convicting the appellant, he did not explain to them as to when and how can such evidence be used. While relying on the case of **Mohamed Jabir v. Republic,** Criminal Appeal No. 357 of 2017 (unreported), he argued that this was an irregularity which vitiated the trial. In this regard, Mr. Nkoko argued that failure to comply with such requirement rendered the whole trial a nullity and urged the Court to invoke section 4(2) of the Appellate Jurisdiction Act Cap 141 R.E. 2002 (now R. E. 2019) (the AJA) and nullify the proceedings and judgment, quash the conviction and set aside the sentence imposed against the appellant.

With regard to the way forward, Mr. Nkoko urged the Court to set the appellant free as there was no sufficient evidence to sustain the conviction. He argued that the cautioned statement that was relied upon

was problematic as it was admitted without being properly cleared. He added that the prosecution evidence by PW1, PW2, PW4, PW5 and PW8 was contradictory as to what took place at PW1's residence. On top of that he argued that, there was no clear identification of the belongings of the deceased allegedly found in the appellant's room. He said, ordering a retrial under the circumstances would give an opportunity to the prosecution to fill up gaps. He thus, prayed to the Court to allow the appeal and release the appellant from custody.

In reply, Ms. Kitaly readily conceded to the anomalies pointed out by Mr. Nkoko and that they rendered the proceedings and judgment a nullity with the remedy of being nullified.

As to the way forward, she was of the view that a retrial was the proper option because of the sufficient evidence from PW1, PW2, PW4, PW5 who witnessed the recovery of the deceased's belongings from the appellant's room. She contended that, the same were recovered under emergency after having suspected the appellant while they were in the course of investigation and hence, they could not have with them the search warrant or certificate of seizure. Basically, she submitted that

there was evidence showing that the deceased died and that the appellant was involved.

We have examined and considered the arguments of either side and the record of appeal. Our starting point would be to restate that it is a requirement of law for the High Court when dealing with criminal matters to sit with assessors. This is provided for under section 265 of the Criminal Procedure Act, Cap 20 RE 2002 [Now R. E. 2019] (the CPA). The assessors are selected in terms of section 285 (1) of the CPA which provides as follows:-

> *"When a trial is to be held with the aid of assessors, the assessors shall be selected by the court".*

In the case of **Hilda Innocent v. Republic,** Criminal Appeal No. 191 of 2017 (unreported), the Court reiterated the position of the law when it stated as follows:-

> *"It is instructive to note that involvement of the assessors as per section 285 (1) of the CPA begins with their selection. The trial judge therefore* ***must indicate in the record that the assessors were selected, followed by asking the accused person if he objects to the participation of any of the assessors before the commencement of a trial.***

This must usually be followed by the usual practice that the trial judge must inform and explain to the assessors the role and responsibility during the trial up to the end where they are required to give their opinions after summing up of the trial judge".

[Emphasis added]

It is also worth noting that, requiring the accused to comment on whether he objects or not to any assessor to participate in the conduct of his case is not a rule of law, but it is now a well-established practice that the trial judge is obliged to observe - See **Laurent Salu and 5 Others v. Republic,** Criminal Appeal No. 176 of 1993 (unreported); and **Tongeni Naata v. Republic [1991]** TLR 54; **Apolinary Matheo and 2 Others v. Republic,** Criminal Appeal No. 436 of 2016; (unreported) and **Malambi Lukwaja** (supra).

In the instant case, having examined the record of appeal, we are in agreement with both counsel that there was non-compliance with the requirement as propounded in **Hilda Innocent's** case (supra). Pages 32-33 of the record of appeal depicts how the assessors were selected. For clarity, we take the liberty to reproduce the relevant portion of what transpired on that date as hereunder:-

"26 February, 2019"

Coram:Hon Y.J. Mlyambina J.

For Republic: Anna Chimpaye and Saada Mohamed

State Attorneys.

For the Defence: Nehemia Nkoko, advocate

Assessors: 1. Rehema Ramadhani

2. Prales Buluguze

3. Filea Mhando

Cc: Banza

The information of murder is read over and explained to the accused in the language understood by him (Kiswahili) and required to plea thereto:

Plea: *It is not true*

Court: *Accused maintains a plea of not guilty.*

Sgd. Hon. Mlyambina
JUDGE
26/2/2019

Assessors introduced in an open court and the counsel stated:

Anna State Attorney:

We have no objection with the assessors

Nehemia Advocate:

My Lord, I have no objection

Anna State Attorney:

My Lord, we have 8 witnesses.

PROSECUTION CASE OPENS:

PW1 Engera Kileo...."

As it can be reflected on the above excerpt, from the record of appeal, there is no gainsaying that the assessors were not properly selected. It is not shown in the record of appeal that the assessors were selected or appointed as required by the law. What is vivid is that the trial judge just listed the names of the assessors. Apart from that, it is not shown that the appellant was asked to comment or to state if he had an objection to any of the assessors to participate in the trial of his case. Instead, he asked the learned counsel for the prosecution and the accused if they did object to any of the assessors and they replied that they did not object which was contrary to the law. Moreover, the trial judge did not inform and explain to the assessors their role and responsibility during the trial up to the time they will be required to give their opinion.

In times without number, this Court has held that failure to comply with such requirement vitiates the whole trial. For instance, in the case

of **Andrea Bernard and Another v. Republic,** Criminal Appeal No. 128 of 2015 (unreported), the Court while citing the case of **Laurent Salu and 5 Others v. Republic,** Criminal Appeal No. 176 of 1993 (unreported) stated as follows:-

> *"Admittedly, the requirement to give the accused the opportunity to say whether or not he objects to any of the assessors is not a rule of law. It is a rule of practice which however, is now well established and accepted as part of the procedure in the proper administration of justice in the community. The rationale of the rule is fairly apparent. The rule is designed to ensure that the accused has a fair hearing."*

Consequently, in the case of **Andrea Bernard and Another** (supra), the Court found that failure to do so amounted to an irregularity or denial of his (appellant's) right to a fair trial - See also **Michael Kazanda @ Kaponda and 2 Others v. Republic,** Criminal Appeal No. 374 of 2017; **Chacha Matiko @ Magige v. Republic,** Criminal Appeal No. 562 of 2015 (unreported); **Khamis Abdul Wahab Mahamoud v. The DPP,** Criminal Appeal No. 496 of 2017 (unreported). Thus, in this case, since it is obvious that the appellant's case proceeded with trial with the assessors whose selection did not involve the appellant, such

trial was vitiated - See **Yustine Robert v. Republic,** Criminal Appeal No. 329 of 2017 (unreported).

Besides that, it is important to note that it has been a practice after selecting the assessors for the trial judge to inform and explain to them their role and responsibility during the whole trial up to the end of the trial when they will be required to give their opinion after summing up - See **Hilda Innocent** (supra). In this case, however, as was rightly submitted by both counsel, the trial judge did not explain to the assessors their roles and responsibility in the trial. Thus, in the case of **Hilda Innocent** (supra), it was held that failure to inform the assessors on their role in the trial, diminished the assessor's level of participation and, therefore, rendered their participation meaningless. Without much ado, we think even in this case the assessors' participation must have been rendered meaningless for such failure by the trial judge to explain to them their role.

Besides that, it is the duty of the trial judge who conducts a trial with the aid of the assessors to sum up the case to the assessors. This is a requirement under section 298 (1) of the CPA which states 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."

Although, the above cited provision may not seem to be imperative, it is a well-established principle that the trial judge has to sum up the case to the assessors to enable them give their opinion as required by the law - (See **Laurent Salu and 5 Others** (supra). Moreover, in the case of **Washington Odindo v. Republic,** [1954] 21 EACA 342, it was underscored that the opinion of assessors could be of great value and assistance to the trial judge only if they fully understand the facts of the case in relation to the law. In this regard it is important to point out that the summing up must contain all essential elements of law involved. Thus, in the case of **Kato Simon and Another v. Republic,** Criminal Appeal No 180 of 2017 (unreported), where the trial judge failed to address the assessors on vital points of law, the Court found that the assessors did not fully participate in the trial and nullified the entire proceedings, judgment and sentence thereof.

Also, in the case of **DPP v. Ismail Shebe Islem and 2 Others,** Criminal Appeal No. 266 of 2016 (unreported), when the Court was confronted with an akin scenario, it was observed that, non-direction on ingredients of the offences charged had the effect of vitiating the entire trial.

Having examined the record of appeal, it is clear that in the judgment at page 128 of the record of appeal the trial judge explained some cardinal principals of law such as the burden and standard of proof in criminal cases and defined the offence of murder. Equally, it is undisputed that none of the witnesses saw when the offence was committed. However, in convicting the appellant, the trial court relied on the cautioned statement (Exh P4) of the appellant as shown at pages 144 to 146 of the record of appeal and the circumstantial evidence as shown at pages 147 to 148 of the record of appeal.

However, looking at the summing up by the trial judge from page 87 to page 109 of the record of appeal, it is notable that the trial judge did not direct the assessors the ingredients of the offence of murder to which the appellant was convicted with. Neither did he explain to the assessors the vital points of law involved in the cautioned statement (Exh P4) of the appellant and more so when taking into account that it

was repudiated and its implications. He did not also explain to them the circumstantial evidence and how it can be relied upon to mount a conviction.

It is our considered view that, since the vital points of law in relation to the offence of murder, cautioned statement and the circumstantial evidence were involved in the case, the trial judge ought to have explained them to the assessors. The effect of failure to do so is that, it cannot be said that the trial in this case was with the aid of the assessors as was envisaged under section 265 of the CPA as the assessors could not be in a position to fully participate in the trial - **Kato Simon and Another** (supra). Hence, the entire proceedings and judgment thereof are a nullity. On this basis, we allow ground No. 6 of the appeal.

On the way forward, we have considered the argument from either side and the available evidence in this case and, we are of the considered view that, given the nature of the offence being a capital offence and in the interest of justice, the best option would be ordering a retrial. Consequently, we invoke our revisional powers bestowed on us under section 4 (2) of the AJA and nullify the trial court's proceedings

and judgment, quash the conviction and set aside the sentence imposed on the appellant and further order a retrial before another judge with a new set of assessors. Meanwhile, the appellant shall remain in custody to await for a fresh trial.

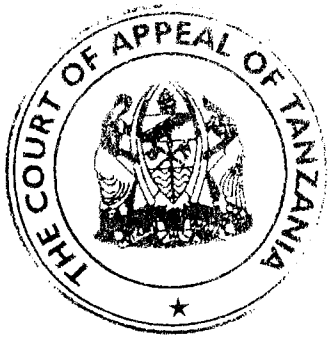
DATED at **DAR ES SALAAM** this 3rd day of August, 2021.

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 Imelda Mushi, learned State Attorney for the respondent/Republic is hereby certified as a true copy of the original.



G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL