IN THE COURT OF APPEAL OF TANZANIA

AT BUKOBA

(CORAM: MWAMBEGELE, J.A., KEREFU, J.A., And KENTE, J.A.)

CRIMINAL APPEAL NO. 481 OF 2019

1. **SPRIANUS ANGELO**
2. **GAUDIAN ANTHONY @ MUGANYIZI**
3. **ELIUD WILLIAM**
4. **GAVUNA MALCHORY**
5. **EGIDIUS BURCHARD**
6. **ANTHONY ANATORY**
7. **PHINIAS SAULO @ KAPONDO**

..... **APPELLANTS**

VERSUS

THE REPUBLIC ..... **RESPONDENT**

(Appeal from the Judgment of the High Court of Tanzania, at Bukoba)

(Mugeta, J.)

dated the 20th day of September, 2019
in
Criminal Sessions Case No. 27 of 2017

.....

JUDGMENT OF THE COURT

18th & 24th August, 2021

MWAMBEGELE, J.A.:

The High Court of Tanzania sitting at Bukoba, convicted the seven appellants - Sprianus Angelo, Gaudian Anthony @ Muganyizi, Eliud William, Gavuna Malchory, Egidius Burchard, Anthony Anatory and Phinias Saulo @ Kapondo - for the murder of Marisiana Gerald on 20.06.2016 at Nundu

Buhaya Village, Kagoma Ward of Muleba District in Kagera Region. They were awarded the mandatory death sentence. Aggrieved, the appellants have now come before us on a first appeal protesting their innocence.

To appreciate the appeal before us, we find it appropriate to narrate, albeit briefly, the material background facts leading to the appellants' arraignment as can be gleaned from the record of appeal. On the fateful day in the morning, the deceased was together with her daughter Pelagia Fidelis (PW1) working in a *shamba* when a group of uninvited people appeared. The group, which allegedly included Sprianus Angelo, the first appellant, accused the deceased of being a witch and that he had, through witchcraft, bewitched one Byela; wife of a certain Moses, who had been constantly attacked by demons. They assaulted them and dragged them to the residenceof the said Moses, manhandled them telling the deceased in the process to heal Byela w/o Moses. They alleged that Byela w/o Moses had horns in her chest and stomach which had been put by the deceased through occult powers. As the deceased could not meet the demands of the group to heal Byela w/o Moses, they poured petrol on her body and set fire on her. She burnt to death instantly.

All the foregoing acts were eye-witnessed by PW1 who was also a victim of the assault. After they had burnt the deceased, the group dispersed. There, PW1 called Desdery Chrisant (PW3), the Nundu hamlet chairman, to whom she narrated what had actually transpired and, immediately, named the first appellant and Naomi Ferdinand, Joanita Sylvester, Jordan Trazias and Verianus Trazias who are not parties to this appeal. PW3 informed the police of the incident and when the Officer Commanding Station (OCS) showed up, PW1 named another assailant, a certain Edisia w/o Venant, who also is not a party to this appeal as being among the assailants. The first appellant was arrested immediately. The rest were arrested later at different times and, consequently, arraigned as stated above. They all denied the charge levelled against them, most of them bringing to the fore the defence of alibi. After a full trial, they were found guilty, convicted and sentenced as shown above.

The appellants' lodged a six-ground memorandum of appeal but Mr. Aaron Kabunga, one of the advocates in a team of lawyers which represented them on this appeal, sought to abandon. In its stead, the learned advocates for the appellants argued the appeal on a three-ground supplementary memorandum they jointly filed. The three grounds are:

1. That, the Honourable trial High Court erred in law to deny the appellants the right to call the doctor who conducted postmortem and made autopsy report of the deceased, the act which amounted to unfair trial and denial of the constitutional right to be heard;

2. That, the Honourable trial Judge erred in law for failure to address the court assessors on vital points of law in summing up, the misdirection and non-direction which vitiates the proceedings on account that the proceedings were conducted without the aid of assessors as required by law; and

3. That, the Honourable trial Judge of the High Court erred in law to convict the appellants basing on the prosecution's case which did not prove the offence to the standard required by law.

At the hearing of the appeal, Mr. Aaron Kabunga, Mr. Joseph Bitakwate and Mr. Remedius Mbekomize, learned advocates, joined forces to represent the appellants. The respondent Republic had the services of Ms. Happiness Makungu and Ms. Suzan Makule, learned State Attorneys.

It was Mr. Kabunga who kicked the ball rolling. Arguing on the first ground of appeal, the learned counsel argued that the appellants were denied the right to a fair trial in that, at the preliminary hearing stage, they had shown objection to the admission in evidence of the Postmortem Report and the sketch plan of the scene of crime as they wished to cross-

examine the medical practitioner who conducted the autopsy of the body of the deceased and the police officer who drew the sketch plan. Despite the objection, the High Court proceeded to admit the two documents, anyway. That course of action, Mr. Kabunga submitted, was a blatant abrogation of the appellants' right to be heard enshrined in article 13 (6) of the Constitution of the United Republic of Tanzania, 1977 (the Constitution) and the provisions of section 291 (3) of the Criminal Procedure Act, Cap. 20 of the now Revised Edition, 2019 (the CPA). On the right to be heard, the learned counsel cited our decision in **Mbeya-Rukwa Autoparts and Transport Ltd v. Jestina George Mwakyoma** [2003] T.L.R. 251 at p. 253 where we insisted on the right to be heard. Mr. Kabunga argued that the way forward to this shortcoming would have been a retrial of the appellants but for the submissions and arguments on the third ground of appeal to be canvassed (infra), he was hesitant to make such a prayer.

Regarding the second ground of appeal, Mr. Kabunga submitted that the provisions of section 265 of the CPA requires that every trial before the High Court must be with the aid of assessors and that under section 298 (1) a Judge must sum up to assessors on vital points of law. The learned counsel took us to p. 62 of the record of appeal where, for instance, the trial Judge intimated to the assessors that the issue for their opinion was

whether the appellants were properly identified as the assailants by PW1 and PW2. That was not legally correct as the trial Judge ought not to have limited the assessors' opinion on evidence of visual identification only. The learned counsel argued further that the trial Judge ought to have summed up to assessors on common intention as mere presence at the scene of crime does not necessarily mean participation in the commission of the offence.

Another fact which was relevant to be summed up to assessors and its implication was the testimony of Adventina Gerald (PW2) who was initially arrested in connection with the murder but was later released and turned into a prosecution witness. The trial Judge should have told the assessors the manner such evidence was to be treated, he contended.

Likewise, Mr. Kabunga went on, the trial Judge should have briefed the assessors on the testimony of PW1 and its implications when at the very outset she got an opportunity to reveal who the assailants were, disclosed only the first appellant and Naomi Ferdinand, Joanita Sylvester, Jordan Trazias and Verianus Trazias as the assailants but later she named others. Relying on our decision in **Isdory Cornery @ Rweyemamu v. Republic**, Criminal Appeal No. 230 of 2014 (unreported), Mr. Kabunga

argued that failure to mention all the assailants at the outset put the evidence of PW1 to question.

With regard to the defences of alibi, the learned counsel submitted that the trial Judge did no more than tell the assessors that it should be considered. The trial Judge ought to have told the assessors on what the defence of alibi entails and how it should be pleaded and implications of it when no notice is given.

Failure to sum up to assessors on vital points of law, Mr. Kabunga submitted, is fatal. The learned counsel cited to us our decisions in **Isdory Cornery @ Rweyemamu** (supra) and **Moshi Mabeja v. Republic**, Criminal Appeal No. 74 of 2014 (unreported) to buttress this proposition.

With regard to the way forward, Mr. Kabunga argued that, ordinarily, this ailment would have attracted a retrial of the appellants but, again, because of the arguments that will be presented when arguing the third ground of appeal (infra), he, like on the first ground, was hesitant to make such a prayer.

Mr. Bitakwate argued the third ground of appeal; a complaint that the case against the appellants was not proved beyond reasonable doubt. He submitted that PW1 who is the eye-witness was not credible in that at

pp. 22 – 23 she testified that it was a multitude of people and that everybody who arrived there attacked them. How could that be possible?, Mr. Bitakwate asked. He contended, it was not possible for the witness to observe the role played by every person who attended at the scene of the crime.

Another piece of evidence which showed that PW1 was not credible, Mr. Bitakwate contended, is the fact that at the outset, she mentioned to PW3 only the first appellant and others who are not parties to this appeal as being among the assailants. Edisia w/o Venant who was acquitted, was mentioned at a later stage when the OCS arrived. Failure to name all the suspects at the earliest moment possible put his credibility to question. To buttress this proposition, the learned counsel cited to us our decision in **Cornery @ Rweyemamu** (supra) in which we relied on our previous decision in **Marwa Wangiti v. Republic** [2003] T.L.R. 39 to hold that the ability of a witness to name a suspect at the earliest opportunity is an important assurance of his reliability in the same way as unexplained delay or complete failure to do so should put a prudent court to inquiry. The learned counsel thus implored us to find and hold that PW1 was not a witness of truth.

The learned counsel did not stop there. He also submitted that the appellants might have been present at the scene of crime but mere presence, he argued, does not mean that they participated in the commission of the offence. To buttress this proposition, Mr. Bitakwate referred us to our decision in **Jackson Mwakatoka v. Republic** [1990] T.L.R. 17 in which we so held.

In view of the above, the learned counsel submitted the case against the appellant was not proved to the required standard; that is, beyond reasonable doubt, hence a retrial will not be feasible. He thus implored us to dismiss the appeal and set the appellants free.

Ms. Masule, despite conceding to the ailments the subject of the first and second grounds of appeal, resisted the prayer for releasing the appellants with some force. It was her contention that a retrial order was the best way forward in that there was ample evidence on record to implicate the appellants to the hilt. As for the first and second grounds, she contended that, indeed, the High Court erred in denying the appellants opportunity to cross-examine the doctor who conducted the autopsy of the deceased's body and the police officer who prepared the sketch plan. She

contended that the complaints the subject of the first and second ground of appeal, were meritorious.

With regard to the way forward, the learned State Attorney argued the third ground of appeal and contended that PW1 was credible and reliable and that the case against the appellants, if it were not for the ailments in the first and second grounds of appeal, had been proved beyond reasonable doubt. She clarified that the incident took place in broad daylight and PW1 had three hours to observe the assailants who were well known to her. The learned State Attorney took us to pp. 20 – 22 of the record of appeal where the witness explained the role each appellant played in the commission of the offence. To buttress this point, the learned State Attorney cited to us our decision in **Goodluck Kyando v. Republic** [2006] T.L.R. 363 in which we observed that every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons for not believing him. Ms. Masule submitted further that the appellants did not cross-examine on that relevant testimony of PW1 which means that they agreed with what the witness said. To buttress the point, she promised to avail the Court with an authority to the effect and, indeed, the learned State Attorney walked the talk; she availed our unreported decision in **Bashiri John v.**

Republic, Criminal Appeal No. 486 of 2016 in which we relied on our previous unreported decision in **Cyprian Athanas Kibogoyo v. Republic**, Criminal Appeal No. 88 of 1992 to hold that failure to cross-examine a witness on an important matter implies the acceptance of the truth of the evidence of that witness.

Ms. Masule submitted further that even though PW1 might have been in a state of confusion as observed by the trial Judge at p. 94 of the record, PW1's testimony, in view of **Goodluck Kyando** (supra) and section 143 of the Evidence Act, Cap. 6 of the Revised Edition, 2019, did not need corroboration. It was sufficient by itself to prove the guilt of the appellants to the hilt. With regard to the argument by the appellants' advocates that a retrial order will accord the prosecution opportunity to fill in the gaps, the learned State Attorney argued that, in view of her arguments above, there were no gaps to fill in. In the premises, the learned State Attorney argued that a retrial of the appellant was the appropriate way forward in the interest of justice and implored us to so order.

In a brief rejoinder, Mr. Kabunga reiterated their argument that the star witness for the prosecution; PW1, was not a witness of truth for failure

to mention all the appellants at the earliest opportunity. He added that even PW3 was surprised why PW1 did not name all the suspects at the outset when she met him, as appearing at p. 32 of the record of appeal. As if that was not enough, the learned counsel argued, PW1, as appearing at p. 23 of the record of appeal, appears to have recorded her statement at the police twice; on 20.01.2016 and 21.01.2016. The second statement was recorded in the presence of the Regional Commissioner. That suggests an afterthought on the part of PW1, he argued.

We have carefully examined the record of appeal and taken account of the submissions of the learned advocates for the appellants on the one hand and those of the learned State Attorney for the respondent Republic, on the other. We propose to first address, albeit briefly, the uncontested matters in the same order they were canvassed by the parties, the subjects of the first and second grounds of appeal. We will thereafter consider the contested matter; the third ground of appeal which is decisive on the way forward.

The complaint in the first ground of appeal is, as shown above, that the High Court erred in denying the appellants' right to call the doctor who conducted the autopsy of the body of the deceased. That course of action,

the advocates for the appellants argued and supported by the adversary side, amounted to an unfair trial and denial of the appellants' constitutional right to be heard. In order to appreciate this complaint and the decision we are going to make, we find it apposite to reproduce what actually transpired in court during preliminary hearing on 08.02.2018 as appearing at p. 10 through to p. 11 of the record of appeal. After the facts of the case facing the appellants were narrated in court, Mr. Hashim Ngole, the learned Principal State Attorney who represented the Republic, sought to tender the Postmortem Examination Report and sketch plan. We will let the record of appeal speak for itself:

> ***"Mr. Ngole:***
> *I pray to tender the Post-Mortem Examination Report and the sketch plan of the scene of crime as exhibits if no objection from the defence.*
>
> ***Mr. Lameck:***
> *My Lord, I object as I would like to cross examine the maker of these documents.*
>
> *Sgd. S.B. Bongole*
> ***Judge***
>
> *08/02/2018*
>
> ***Court:***

As there is no dispute that the deceased died as a result of been burnt and her body was obvious found on the scene. I don't find if it is necessary for the Doctor who examined the deceased's body to come and testify on the obvious. There won't be a need of his medical expertise to assist the court. Equally, the same applies to the police officer who drew the sketch plan. Hence by the nature of how it is alleged the death of the deceased occurred the objection levelled holds no water and it is overruled. The Post Mortem Examination Report and sketch plan of the scene of crime admitted exhibit "P1" and "P2" respectively.

Sg. S.B. Bongole

Judge

08/02/2018"

As seen above, counsel for the accused persons (the appellants inclusive) objected to the production of, *inter alia*, the Postmortem Examination Report because he intended to cross-examine the makers of those documents. The High Court Judge overruled the objection under the pretext that there was "no dispute that the deceased died as a result of being burnt and her body was obvious found on the scene". The learned Judge thus did not find it "necessary to summon the Doctor who examined

the deceased's body to come and testify on the obvious". The same was his stance with respect to the sketch plan. With profound respect to the learned High Court Judge who conducted the preliminary hearing, we respectfully think, for this stance, he slipped into error. How did he know that the deceased's death and sketch plan were not disputed? If anything, disputed they were and that is the reason why counsel for the appellants objected to their being tendered at that stage. It was not "obvious" as the learned Judge put it. With unfeigned respect, we are of the view that the High Court Judge not only denied the appellants' right to cross-examine the makers of the medical document and the sketch plan, but also downplayed the very essence of conducting the preliminary hearing which is, *inter alia,* to deduce matters which are not in dispute. It is no wonder therefore that the Postmortem Examination Report and the sketch plan did not feature in the memorandum of matters that were not in dispute which was drawn thereafter.

The above said, we agree with the appellants' counsel that the path taken by the High Court deprived the appellants' right to cross-examine the doctor and the police officer who prepared, respecgtively, the Postmortem Examination Report and the sketch plan. That course of action, with regard to the medical document, flouted the mandatory provisions of

section 291 (3) of the CPA. For easy reference, we take the liberty to reproduce the section hereunder:

> *"(3) In any trial before the High Court, any document purporting to be a report signed by a medical witness upon a purely medical or surgical matter, shall be receivable in evidence save that this subsection shall not apply unless reasonable notice of the intention to produce the document at the trial, together with a copy of the document, has been given to the accused or his advocate."*

The Court has, times without number, interpreted the sub-section to be mandatory – see: **Dawido Qumunga v. Republic** [1993] T.L.R. 120 and **Elias Mtati @ Ibichi v. Republic**, Criminal Appeal No. 65 of 2014 (unreported). In **Elias Mtati @ Ibichi**, for instance, we observed:

> *"Often times it is forgotten that just as is the case with section 240 (3) of the CPA, its kith, section 291 (3) of CPA, also carries with it the requirement under which the court is imperatively enjoined to inform the accused of his/her right to have the medical officer summoned for examination."*

In view of the above, the appellants had a right to require the doctor who conducted the autopsy on the deceased's body and prepared the

Postmortem Examination Report to be featured by the prosecution so that they would cross-examine him on the document he prepared. Failure to do that, and on an order of the court, in our considered view, occasioned injustice to the appellant and led them to being unfairly tried. The document was received in evidence in blatant disregard of the mandatory provisions of section 291 (3) of the CPA and ought not to have been acted upon in the subsequent trial.

The same applies with regard to the sketch plan. After counsel for the accused person objected to its being tendered in evidence so that the maker could be fielded and cross-examined, the learned Judge ought not to have admitted it in evidence. The course of action taken by the Judge to admit it at that stage despite the objection of counsel for the accused prosecution, in our considered view, left justice crying.

Next for consideration is the second ground of appeal whose subject is failure by the trial Judge to direct the assessors on vital points of law. This issue will not detain us much, for the law on it is fairly settled. The trained minds for the parties are at one that the trial Judge did not direct the assessors on vital points of law. We profoundly agree. As rightly put by the learned counsel for the appellants and rightly agreed by the learned

State Attorney, in terms of the provisions of section 265 of the CPA, all criminal trials before the High Court are conducted with the aid of assessors the number of whom shall be two or more as the court may find appropriate. Likewise, under section 298 (1) of the same Act, the trial Judges sitting with assessors is mandatorily required to sum up to them before inviting them to give their opinions. I have used the phrase "mandatorily requires" because case law has defined the phrase "the judge may sum up" appearing in section 298 (1) of the CPA that despite using the term "may", it does not mean that the trial Judge can forbear with the summing up to assessors – see: **Mulokozi Anatory v. Republic**, Criminal Appeal No. 124 of 2014 (unreported).

In **Augustino Lodaru v. Republic**, Criminal Appeal No. 70 of 2010 and **Omari Khalfan v. Republic**, Criminal Appeal No. 107 of 2015 (both unreported), we underscored the need for the assessors to fully understand the facts of the case before them in relation to the relevant law before inviting them to give their opinion. In so doing, we quoted the following excerpt from the decision of the erstwhile Court of Appeal for East Africa in the case of **Washington s/o Odindo v. Republic** (1954) 21 EACA 392:

"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 sufficient facts of the case the value of the assessors' opinion is correspondingly reduced*** *...."*

[Emphasis supplied].

In view of the foregoing discussion, we wish to underline that trial High Court judges who sit with the aid of assessors, are duty-bound to sum up adequately to those assessors on all vital points of law. What are the vital points of law which the trial High Court should invariably address to the assessors and take into account when considering their respective judgments will depend on important points of law divulged in each particular case – see: **Omari Khalfan** (supra) and **Said Mshangama @ Senga v. Republic**, Criminal Appeal No. 8 of 2014 (unreported).

Reverting to the case at hand the trial Judge is on record at p. 62 to have directed the assessors as follows:

"Gentleman and ladies assessors, since there is no dispute that the deceased was killed after long time of assault and finally burning, then the killing was

with malice aforethought. The issue for your opinion is whether the accused persons were properly identified as the culprits by PW1 and PW2."

Likewise, with regard to the appellants' defence of alibi, the trial Judge simply told the assessors at p. 63 of the record that:

"the defence of alibi, though raised late must be considered too."

Admittedly, before, at p. 62 of the record of appeal, the trial Judge had told the assessors that the accused persons did not give any notice that they would raise the defences of alibi as required. However, the trial Judge did not go further to explain what that entailed.

We agree with learned advocates for the appellants and the learned State Attorney in concession, that summing up to assessors in the present case fell short of the minimum threshold required by the law. In **Kashinje Julius v. Republic**, Criminal Appeal No. 305 of 2015 (unreported), we observed that a trial with such ailments cannot be construed to be one with the aid of assessors. In **Tulubuzya Bituro v. Republic** [1982] T.L.R. 264, the Court was confronted with a similar situation; the assessors were not directed on the law relating to provocation. Following an English case of **Bharat v. The Queen** [1959]

A.C. 533 which was relied upon by the Court in its earlier unreported decision in **Alphonce Philbert v. Republic**, Criminal Appeal No. 27 of 1979, the Court held:

> *"Failure by a judge to direct assessors on the issue of provocation, where evidence shows so, vitiates the entire proceedings".*

By the same token, we cannot resist the urge to recite the following excerpt from **Tulubuzya Bituro** (supra) as reproduced in **Kashinje Julius** (supra) on the consequences of mis-directions and non-directions of assessors on a vital point of law:

> *"Since we accept the principle in **Bharat's** case as being sensible and correct, it must follow that in a criminal trial in the High Court where assessors are misdirected on a vital point, **such trial cannot be construed to be a trial with the aid of assessors. The position would be the same where there is nondirection to the assessors on a vital point."***

In the case at hand, the mis-directions and non-directions of the trial Judge in summing up to assessors shown above vitiated the proceedings

and the attendant judgment. The second ground of appeal is therefore meritorious.

Having found the first and second grounds of appeal as meritorious, we now turn to consider whether a retrial should be ordered as prayed by the learned State Attorney, or it should not as prayed by the learned advocates for the appellants. This entails the determination of the third ground of appeal. However, for fear of preempting the order that we are going to make, we refrain from going into the nitty gritty of this ground. It should only suffice to say that given the serious nature of the offence and the circumstances under which it was committed, we think a retrial order will meet the justice of the case.

In the final analysis, we find merit in the first and second grounds of appeal. We nullify all the proceedings of the trial court and quash the judgment and set aside the death sentences imposed on the appellants. We order that the appellants - Sprianus Angelo, Gaudian Anthony @ Muganyizi, Eliud William, Gavuna Malchory, Egidius Burchard, Anthony Anatory and Phinias Saulo @ Kapondo - be retried afresh before another Judge with a new set of assessors. The matter should commence from the

stage of preliminary hearing. In the meantime, the appellants shall remain in custody awaiting their retrial.

This appeal succeeds to the extent stated above.

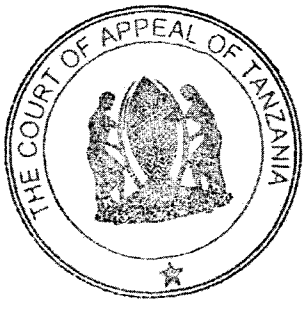
DATED at **BUKOBA** this 23rd day of August, 2021.

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

The Judgment delivered this 24th day of August, 2021 in the presence of Mr. Aaron Kabunga assisted by Mr. Joseph Bitakwate, counsels for the Appellants and Mr. Amani Kilua, learned State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.



F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL