IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MKUYE, J.A., KWARIKO, J.A. And KIHWELO, J.A.)

CRIMINAL APPEAL NO. 368 OF 2019

SHIJA NG'HWAYA NG'HWAGI .....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Moshi,J.)

dated the 9th day of August, 2019
in
Criminal Sessions Case No. 113 of 2016

JUDGMENT OF THE COURT

18th August & 16th September, 2021

KWARIKO, J.A.:

Before the High Court of Tanzania at Dar es Salaam District Registry, Shija Ng'hwaya Ng'hwagi, the appellant stood charged with the offence of murder of one Bernadetha Shaban (the deceased) contrary to section 196 of the Penal Code [CAP 16 R. E. 2002; now R. E. 2019].

Having denied the charge, the appellant was put on full trial and in the end, he was found guilty, convicted and sentenced to suffer death by hanging. Aggrieved by that decision, the appellant has come before the Court on appeal.

At the trial, the prosecution case was built upon six witnesses namely, Esther Shija (PW1), Salome Shija (PW2), Joseph Masine (PW3) Deus Albert Tibedelana (PW4), No. E. 7870 D/Cpl Audfas (PW5) and Dr. Amos Roja Mwakingonja (PW6). The appellant was the sole witness in his defence.

Briefly stated, the prosecution evidence was to the following effect. The deceased and the appellant were former landlady and tenant respectively. However, at the time of the incident, the tenancy agreement had ceased and the appellant was living elsewhere. On 30th April, 2014, the deceased was having breakfast with her children, including PW1 and PW2 at their veranda. Whilst there, PW1 and PW2 heard a sound accompanied with a cry from the deceased. When they looked at her direction, they saw the appellant removing an axe from the deceased's head having cut her. He then took to his heels. The two raised an alarm which was responded to by PW3, a ten-cell leader. When PW3 approached the deceased's house about five meters away, he saw the appellant running away with a blooded axe in his hand. He chased him towards a pond in which the appellant entered, and crossed over. PW3 followed him and when he arrived on the other side, he was apprehended with the help of other people including PW4.

Upon apprehension, the appellant was sent to the police station, following which PW5 visited the scene of crime and drew a sketch map (exhibit P1). On being interrogated by PW5, the appellant denied the allegations but complained that he had misunderstanding with the deceased over his household items. He was consequently charged and convicted for threatening her and at that time he was on parole.

Meanwhile, the deceased who was taken to hospital died three days later and the autopsy on her body was conducted by PW6 in which he found the cause of death to be severe brain injury and hemorrhage due to sharp forced trauma. He posted his findings in a postmortem examination report (exhibit P2).

In his defence, the appellant denied the allegations and raised a defence of *alibi.* He stated that while fishing in the pond on 29th April, 2014 he heard people shouting that there was a thief. He went out where he met two Maasai people. When he inquired as to what the matter was, he was told to wait and one of them made a phone call and other people came including PW3 and PW4. He was instead apprehended and taken to police station for allegations of theft. However, whilst there, he heard those people talking about theft and murder allegations but at the end he was accused of killing the deceased.

At the conclusion of hearing, the trial court found the prosecution case was proved beyond reasonable doubt, convicted the appellant and accordingly sentenced him as indicated earlier.

In this Court the appellant has lodged memorandum of appeal and supplementary memorandum containing five and two grounds respectively. At a later stage, in terms of Rule 73 (2) of the Tanzania Court of Appeal Rules, 2009, the appellant's counsel lodged a supplementary memorandum of appeal containing five grounds.

At the hearing of the appeal, the appellant was represented by Mr. Musa Mhagama, learned advocate; whilst Misses. Esther Kyara and Lilian Rwetabura, learned Senior State Attorneys appeared for the respondent Republic.

At the outset, when Mr. Mhagama rose to argue the appeal, he opted to argue the grounds of appeal which he filed and abandoned the two sets of memoranda lodged by the appellant.

In respect of the first ground of appeal, Mr. Mhagama argued that PW6 was not listed as one of the witnesses and his statement was not read over during committal proceedings which contravened section 246 (2) of the Criminal Procedure Act [CAP 20 R. E. 2019] (the CPA). That, the prosecution did not also comply with section 289 (1) and (2) of the

CPA to bring PW6 as an additional witness. He argued that this was a fatal irregularity and implored us to expunge his evidence from the record in consonant with this Court's decision in **Ramadhan Mashaka v. R,** Criminal Appeal No. 311 of 2015; **Castor Mwakajinga v. R,** Criminal Appeal No. 268 of 2017; and **Charles Samwel v. R,** Criminal Appeal No. 78 of 2019 (all unreported).

In response to the foregoing, while Ms. Rwetabura admitted that PW6 was not listed as a witness during the committal proceedings, exhibit P2 which was authored by him was read over at that time, thus the omission was not fatal since it did not prejudice the appellant. She argued that the cited authorities are distinguishable since there were no exhibits read over in those cases.

On our part, having perused the record of appeal, we agree with both parties that PW6 was not listed as a witness during committal proceedings as provided under section 246 (2) of the CPA. However, as rightly submitted by Ms. Rwetabura, the postmortem report (exhibit P2) which was authored by him containing the substance of his evidence was read over during that time in compliance with the cited provision of the law. We are of the settled mind that no injustice was occasioned by that omission and thus we find this ground barren of merit.

The complaint in the second ground is that, neither the appellant was given an opportunity to comment on the assessors, nor did the court explain their duties before the trial commenced. Mr. Mhagama contended that the omission was fatal to the proceedings deserving to be nullified. To support his contention, the learned counsel referred us to our earlier decisions in **Godfrey William Matiko v. R**, Criminal Appeal No. 409 of 2017 and **Frednand Kamande v. R**, Criminal Appeal No. 390 of 2017 (both unreported).

Responding to the foregoing submission, the learned Senior State Attorney argued that the appellant's counsel informed the trial court that the appellant had no objection to any of the assessors. Thus, because the advocate was acting on behalf of the appellant, no injustice was occasioned.

We have examined the record of appeal and found at page 51 the following:

> "**Court:**
>
> The assessors are introduced and the accused person is asked if he has objection to any of them.
>
> **Mr. Erick:**
>
> The accused person does not have any objection.

Court:

The three assessors are [selected] in terms of s. 285 (1) of the Criminal Procedure Act, Cap 20 R. E. 2002.

Sgd. S. C. Moshi

JUDGE

29/7/2019."

As it can be seen from the extract above, when the appellant was asked to comment in respect of the assessors, it was his advocate who conveyed his response to the court. We do not think any prejudice was occasioned to the appellant because the advocate was entrusted to represent him and whatever he conveyed must have come from the appellant who was also present physically in court. Had the appellant have any different view he must have aired it out after the advocate's reply. We hasten to state that each case should be treated according to its own set of circumstances. Unlike those cases cited by Mr. Mhagama where the appellants were not at all given an opportunity to comment about assessors, in this case the appellant was given that chance and responded to through his advocate. In a similar scenario in the case of **Tongeni Naata v. R** [1991] TLR 54, the Court stated *inter alia* thus:

> *"It is a sound practice which has been followed, and should be followed, to give an opportunity to an*

accused to object to any assessor, however, the result of such omission cannot be the same in each case."

As regards the omission to explain duties of the assessors during the trial, we are increasingly of the view that it did not occasion any injustice to the appellant. This is so because, the assessors participated fully throughout the trial by asking questions in respect of almost all witnesses including the appellant in his defence and they ultimately gave their respective opinion after the summing-up of the case by the Judge. That means, they knew what their duties were, otherwise they could not have participated to that extent. The appellant did not say how he was prejudiced by that omission and we do not see any prejudice because the assessors participated in the entire trial. Again, in the **Tongeni Naata**'s case (supra) when the Court discussed the issue of prejudice whenever there is an omission, it held thus:

"Merely making the omission a ground of appeal without showing how the appellant was prejudiced at the trial will not vitiate the proceedings."

With the foregoing discussion, we find this ground too without merit.

Mr. Mhagama argued in respect of the third ground of appeal that, the trial court did not properly sum – up the case to the assessors. He explained that the learned Judge did not explain vital points of law to the assessors before they gave their opinion. He mentioned the vital

points to be malice aforethought and appellant's defence of *alibi.* He relied upon the case of **Charles Samuel** (supra) to fortify his contention.

For her part, Ms. Rwetabura argued that, malice aforethought was explained to the assessors as shown at page 89 of the record of appeal. In respect of the defence of *alibi,* she contended that although the appellant raised it during his defence contrary to section 194 of the CPA, the trial Judge considered it in the judgment at page 140 of the record, hence the appellant was not prejudiced.

Having considered the submissions from both learned counsel in respect of this complaint, we find the issue to decide is whether the trial Judge sufficiently explained the vital points of law to the assessors during the summing up of the case. To start with, we wish to restate that section 265 of the CPA provides that all criminal trials before the High Court should be conducted with the aid of assessors. This position of the law has been emphasized by the Court in its many decisions including **Charles Karamji @ Masangwa & Another v. R,** Criminal Appeal No. 34 of 2016; **Augustino Nandi v. R,** Criminal Appeal No. 388 of 2017; and **Jeremia Paskal v. R,** Criminal Appeal No. 185 of 2012 (all unreported). In the latter case it was stated thus:

"....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".

Despite the cited mandatory requirement of the law, the trial Judge is also required to sum up the case to assessors by revisiting the evidence on record adduced during the hearing and expounding the issues of law which might have arisen from that evidence. Section 298 (1) of the CPA provides thus:

"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 this provision seems to be discretionary, it has been a rule of practice that at the conclusion of the hearing the trial judge should sum up the case to the assessors and explain to them vital points of law involved. In our earlier decision in **Omari Khalfan v. R,** Criminal Appeal No. 107 of 2015 (unreported) it was stated at page 9 that:

> *"...the phrase "the judge may sum up" does not mean that the trial Judge can skip the summing up to assessors. This phrase has been expounded by the Court to imply a mandatory duty placed on the shoulders of the trial Judge to sum up."*

This position was also taken in **Mulokozi Anatory v. R,** Criminal Appeal No. 124 of 2014 (unreported).

If that is the law, what we are supposed to decide now is whether the trial Judge properly summed up the case to the assessors. The court record is clear that after the close of the case for both sides, the trial Judge summed up the case to assessors by summarizing the evidence from both sides and explained some of the vital points of law, such as circumstantial evidence. However, the Judge did not explain other vital points of law, namely; malice aforethought and defence of *alibi* which was relied upon by the appellant.

Firstly, we do not agree with the learned State Attorney that the trial Judge sufficiently explained a point of law regarding malice aforethought. This is so because she only stated at page 89 of the record of appeal thus:

> *"Malice aforethought is defined as an intention to cause death or grievous harm to a person whether such*

*person is a person actually killed or not or acting with knowledge that the act or omission causing death will probably cause the death or grievous harm or an intention to commit the offence (see section **200 of the Penal Code** (supra)."*

As it can be deduced in the extract above, the trial Judge only reiterated the definition of malice aforethought and no more. It is our considered opinion that the Judge ought to have gone further to show how that point of law was applicable in the offence charged and how it related in the proof of the offence of murder the appellant stood charged.

Secondly, while the appellant relied upon a defence of *alibi*, the trial Judge said nothing concerning the principles underlying such a defence when she summed up the case to the assessors. Instead, it was in the judgment when the Judge discussed this defence as required by the law and found that it had not shaken the prosecution case. It is our opinion that, this principle ought to have been explained to the assessors before they gave their opinion, as we do not know what their opinion might have been had the principle laid bare at the summing up.

We have shown that the trial Judge erred by her failure to direct the assessors on vital points of law. There is a great number of the Court's decisions which state that failure of the trial Judge to direct the assessors on vital points of law is fatal and thus vitiates the

proceedings. Few of those decisions are: **Omari Khalfan** (supra); **Mulokozi Anatory** (supra); and **Charles Karamji Masangwa & Another** (supra). The Court said in the **Omari Khalfan**'s case that:

> *"As observed above, the assessors must be summed up on facts and every vital points of law so as to give the court an informed verdict. That was not done and, on the authorities discussed above, the ailment vitiates the entire proceedings, for it is impossible to know what the assessors would have said had the vital points of law been put to them."*

On the strength of the cited authorities, since the trial Judge did not direct the assessors on the vital points of law, we agree with Mr. Mhagama that the proceedings were vitiated. However, we are of the considered view that the omission only affected the summing up to assessors and not the whole proceedings as contended by the learned counsel. We thus nullify the proceedings from that stage only. This ground of appeal thus succeeds.

Now, since we have decided the third ground in the affirmative, the remaining grounds of appeal die naturally. As to the way forward, Mr. Mhagama urged us to remit the case file to the trial court for a trial *denovo* or release the appellant from custody because he has been incarcerated for a long time now. We have considered these options and

we have found that, in the circumstances of this case, it is apposite not to release the appellant from custody. We therefore remit the case file to the trial court for a retrial from the stage of summing up to the assessors before the same trial Judge with same set of assessors.

Meanwhile, we order that the appellant shall remain in custody to await the finalization of the trial.

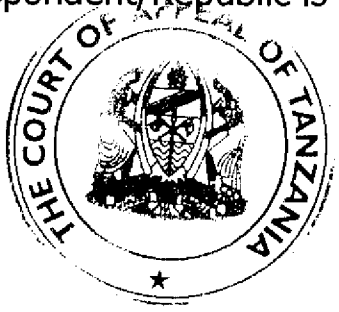
DATED at **DAR ES SALAAM** this 10th day of September, 2021.

R. K. MKUYE
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

The judgment delivered this 16th day of September, 2021 in the presence of the Appellant in person linked via video conference at Ukonga Prison and Ms. Nura Manja, learned State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.



B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL