IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

(CORAM: MUGASHA, J.A., GALEBA, J.A., And FIKIRINI, J.A.)

CRIMINAL APPEAL NO. 263 OF 2018

CHRISTIAN MWINUKA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from RM'S Court of Mbeya Extended jurisdiction at Mbeya)

(Hon. W.M Mutaki -SRM)

dated the 12th July, 2017
in
Criminal Session No. 19 of 2015

RULING OF THE COURT

13th & 17th September, 2021

MUGASHA, J.A.:

The appellant was charged with the offence of murder contrary to section 196 of the Penal Code Cap 16 RE. 2002. The prosecution alleged that, on 23/3/2013 at Uyole area within the City and Region of Mbeya, the appellant did murder one Upendo Samson Mwaipungu, the deceased. After a full trial, the appellant was convicted and sentenced to suffer death by hanging. Undaunted, the appellant has preferred an appeal to the Court. In the Memorandum of Appeal, the appellant has fronted ten grounds of complaint which we have opted not to reproduce for reasons to be apparent in due

course. In order to appreciate, what led to the apprehension, arraignment and conviction of the appellant, it is crucial to state briefly the related background.

On the fateful day, at around 11.00 hrs. Wema Mwaipungu (PW1), Nuru, her sister and their deceased mother were at their residence. While there, came two young men who wanted to see the deceased and they were let in. Shortly thereafter, PW1 heard her deceased mother crying for help lamenting *"mnataka kunifanya nini"*. Then, PW1 entered in the house only to find one of the assailants holding the deceased's neck, while the other one sat on top of the deceased carrying a knife which he used to stab the deceased's stomach. According to PW1, she saw a cut wound on the deceased's stomach and her small intestine protruded outside. This prompted her to raise an alarm while running outside the house she was pursued by one of the assailants who assaulted her and injured her right hand ribs. An alarm raised by PW1 was heeded to by among others, Martha d/o Mdika (PW2), Jastine Mwakituna (PW3) and Saad Saalim, who rushed to the scene of crime and found PW1 injured crying for help whereas the deceased was lying down bleeding as her intestine protruded out of the cut wound. Later, they were all taken to the hospital and the deceased succumbed to death when PW1 was still hospitalised. It was also recounted by PW1 that although the appellant was a

stranger, upon being summoned at the police she identified him at the identification parade. However, no evidence was adduced by the police to demonstrate the conduct of the parade.

PW2 who claimed to have seen assailants running away from the scene of crime, recounted to have identified the appellant who had blood spots all over his body and that he was later rescued from being attacked by an angry crowd after he was apprehended by the traffic police officers. This account was echoed by Ezekiel Richard E. 4665 (PW4) who testified that, on 23/3/2013, while duty at Uyole Tukuyu Road, accompanied by fellow police officers arrested the appellant who was being attacked by the crowd. At the police station, D. 5281 Sgt. Alifa (PW5), recalled to have recorded the cautioned statement (Exhibit P1) and alleged that the appellant confessed to have killed the deceased and assaulted PW1 being together with another person.

In his defence, the appellant denied the accusations by the prosecution. He told the trial court that, on the fateful day, he happened to be at Uyole having travelled from Njombe and while waiting for his host, went to look for something to eat was attacked by a crowd after being accused to be a thief. He was beaten and assaulted and forced to move to a nearby police traffic but he was eventually detained at the police station and later interrogated.

On the whole of the evidence, the trial court was satisfied that, the prosecution case was proved to the hilt. Thus, as earlier indicated the appellants were convicted and sentenced to suffer death.

At the hearing, the appellant was represented by Ms. Irene Joel Mwakyusa, learned counsel whereas the respondent Republic had the services of Mr. Saraji Iboru learned Principal State Attorney and Mr. Davice Msanga, learned, State Attorney.

Before the commencement of the hearing, we invited parties to address us on the propriety or otherwise of the selection of the assessors, the respective summing up of the evidence to the assessors and the validity of the evidence of some of the prosecution witnesses who were not listed in the committal proceedings.

On taking the floor, Ms. Mwakyusa submitted that, apart from the appellant not being involved in the selection of the assessors, the summing up was not properly conducted because the assessors were not adequately addressed on the summary of the evidence at the trial. She argued this to be a fatal omission which vitiated the trial which rendered the trial not conducted with the aid of assessors as required by sections 265 (1) and 298 (1) of the Criminal Procedure Act [Cap 20 RE. 2002] (the CPA). Moreover, she urged the

Court to expunge the evidence of PW2, PW3 and PW5 as the substance of their evidence was not made known to the appellant at the committal stage. On the way forward, she urged the Court to nullify the trial proceedings and judgment, quash and set aside the conviction and the sentence with an order that the appellant be set free arguing that, a retrial is not worthy on account of weak prosecution.

On the other hand, the learned Senior State Attorney apart from conceding to the stated anomalies and that the trial was vitiated, he insisted that a retrial is worthy because the remaining prosecution account on record from PW1 and PW4 is sufficient to hold the prosecution case.

On our part, after a careful consideration of the record before us and submission of the learned counsel for either side, the issue for determination is the propriety or otherwise of the trial and whether on record there is evidence to hold on the prosecution case.

At the outset, we agree with the learned counsel for either parties that, the appellant was not involved in the selection of the assessors and the summing up to the assessors was irregular. Since section 265 of the CPA requires all criminal trials before the High Court and Resident Magistrates with extended jurisdiction to be conducted with the aid of assessors, the

involvement of the assessors commences with their selection in terms of section 285 (1) of the CPA which stipulates:

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

It is thus imperative for the trial Judge or a Resident Magistrate with extended jurisdiction to clearly indicate in the record that the assessors were selected, followed by asking the accused person if he objects to the selection of any assessors before the commencement of the trial. 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. See - **TONGENI NAATA VS REPUBLIC** [1991] TLR 54.

In the present case we observed that before the commencement of the trial what transpired is reflected at page 3A of the record of appeal as follows:

> *"Section(sic) of assessors*
>
> 1. *Exson s/o Nazareth*
> 2. *Yeo s/0 Mwanyenje*
> 3. *M/s Rose Kaunda*
>
> ***Court**: The above assessors have been selected to serve and are notified and informed of their role in the trial".*

With the said exposition, it clearly shows that the appellant who was not called upon to object to any of the assessors was indeed not involved in the selection of the assessors. We have also noted that the summing up to assessors was irregular and this is reflected from page 30 onwards of the record of appeals. The summary of the facts of the case, and the evidence are missing from the purported summing up notes to assessors. This offends the provisions of section 298 (1) of the CPA which provides:

> *"(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."*

Although the words '*the judge may sum up the evidence'* may sound discretionary but the practice has it that they are binding to a trial judge. The said summing up has to be adequate and proper as it enables the assessors to understand the facts of the case before them, attention drawn to the salient facts in relation to the relevant law in order to make informed and valuable opinion. See – **WASHINGTON ODINGO VS REPUBLIC** [1954] 21 EACA 392, **HATIBU GANDHI VS REPUBLIC** [1996] TLR 12 and **KHAMIS RASHID**

OMAR VS DIRECTOR OF PUBLIC PROSECUTION, Criminal Appeal No. 284 of 2013 and **BASHIRU RASHID OMAR VS S.M. Z,** Criminal Appeal No. 83 of 2009 (both unreported). In the latter case, the Court dealt with akin situation. Apart from stating that it is not enough to state that the law has been complied with without stating clearly in the record of proceedings the requirement of conducting summing up to the assessors emphasized that what ought to be in the record is:

> *"1. The summary of the facts of the case.*
> *2. The evidence adduced.*
> *3. Explanation of the relevant law e.g. the ingredient of the offence, malice aforethought etc.*
> *4. Any possible defence and of law regarding those defence."*

In the present appeal, the purported summing up notes to the assessors did not contain the summary of the facts of the case, and the evidence adduced and besides, vital points were not explained to the assessors. In the circumstances, the assessors were not properly guided to aid the trial court as per dictates of section 265 of the CPA. Thus, we agree with both learned counsel that it cannot be safely vouched that, the assessors were properly informed to make rational opinions as to the guilt or otherwise of the appellant

and as such, the trial was vitiated and it is a nullity having contravened the dictates of sections 265 and 298 (1) of the CPA.

As to the way forward, ordinarily the pointed out shortfalls would have been remedied in a retrial. However, learned counsel parted ways on the propriety or otherwise of a retrial. We shall be guided by the decision in **FATEHALI MANJI VS REPUBLIC** [1966] E.A 341, which held that;

> *"a retrial should be ordered only when the original trial was illegal or defective and should not be ordered where the prosecution evidence is patently weak and by ordering a retrial, the prosecution will seize that opportunity to fill up gaps at the prejudice of the appellant."*

The said observations where further amplified in the case of **SELINA YAMI AND OTHERS VS REPUBLIC**, Criminal Appeal No. 94 of 2013 where this Court stated that:

> *"We are alive to the principle governing retrials. Generally, a retrial will be ordered if the original trial is illegal or defective. It will not be ordered because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps. The bottom line is that;*

an order should only be made where the interest of justice require."

The aforesaid position of the law takes us to revisiting the evidence on the record so as to gauge if a retrial is worthy. We begin with the evidence of PW2, PW3 and PW5 who testified at the trial whereas during committal proceedings the substance of their evidence was not made known to the appellant as they were not listed as such. This militates against the mandatory dictates of the provisions of section 289 of the CPA which stipulates as follows:

"No witness whose statement or substance of evidence was not read at committal proceedings shall be called by the prosecution at the trial unless the prosecution has given a reasonable notice in writing to the accused person or his advocate of the intention to call such witness".

The Court was confronted with a similar scenario in the case of **JUMANNE MOHAMED AND 3 OTHERS VS REPUBLIC**, Criminal Appeal No. 534 of 2015 (unreported). The Court stated that: -

"We are satisfied that PW9 was not among the prosecution witnesses whose statements were read to the appellants during committal proceedings. Neither could we find a notice in writing by the prosecution to

have him called as an additional witness. His evidence was thus taken in contravention of section 289(1)(2) and (3) of the Act ...In case where evidence of such person is taken as is the case herein; such evidence is liable to be expunged ...We accordingly expunge the evidence of PW9 including exhibits P6 and P7 from the record."

(See also, **PETER CHARLES MAKUPILA @ ASKOFU VS REPUBLIC**, Criminal Appeal No. 21 of 2019 and **CASTOR MWAJINGA VS REPUBLIC**, Criminal Appeal No. 268 of 2017 (both unreported)).

Therefore, since the evidence of PW2, PW3 and PW5 was taken contrary to the law, we expunge it from the record. This as well, befalls the cautioned statement of the appellant which was adduced in the evidence by PW5. Having expunged the evidence of PW2, PW3 and PW5 we remain with the evidence of PW1 and PW4. Beginning with the evidence of PW1, it hinges on the visual identification of the appellant. It is settled law that visual identification is of the weakest kind and the courts are cautioned not to rely on it unless the possibilities of mistaken identification are eliminated.

In resolving the question whether identification is watertight the Court listed a number of circumstances that must be examined. These include: the

time the witness had the accused under observation, the distance at which he observed him, the conditions in which the observation occurred, for instance, whether it was day or night -time, whether there was good or poor light at the scene; and further whether the witness knew or had seen the accused before. See, for instance, the cases of **WAZIRI AMANI VS. REPUBLIC** [1980] TLR 250, **RAYMOND FRANCIS VS. REPUBLIC** [1994] TLR 100, **AUGUSTINO MAHIYO VS REPUBLIC** [1993] TLR 117 and **ALEX KAPINGA & 3 OTHERS VS. REPUBLIC**, Criminal Appeal No. 252 of 2005 (unreported) among others. In this regard, the Court has always reiterated that caution should be exercised before relying solely on the identification evidence. In **CHOKERA MWITA VS. REPUBLIC**, Criminal Appeal No. 17 of 2010 (unreported) the Court was confronted with a similar issue; the Court held:

> *"In short, the law on visual identification is well settled. Before relying on it the Court should not act on such evidence* ***unless all the possibilities of mistaken identity are eliminated and that the Court is satisfied that the evidence before it is absolutely water tight..."***

[Emphasis supplied]

Guided by the principles elucidated above, in this case the record is completely silent if at all the identifying witness was familiar to the appellant. Since it is on record that the killing incident occurred during day time, the conditions were conducive for the identifying witnesses to clearly see the appellant at the scene of crime which necessitated giving the terms of description of the appellant. This was not the case and instead, the two witnesses each gave a different account. While PW4 told the trial court that the appellant's hand had fresh blood, PW1's account is silent despite asserting to have been attacked by the assailant who had earlier on stabbed her mother. That apart, since according to PW1 one Jackson was the first person to rush at the scene of crime after an alarm was raised, he was better placed having seen what had transpired at the trial and if PW1 mentioned to him or rather gave the terms of description of the assailant. However, Jackson who was a crucial witness was not paraded to testify at the trial. The court was confronted with akin scenario in the case of **AZIZ ABDALLA VS REPUBLIC**, [1991] TLR 71, this Court among other things held:

> *"the general and well known rules are that the prosecutor is under a prima facie duty to call those witnesses who, from their connection with the transaction in question, are able to testify on material*

facts. If such witnesses are within reach but are not called without sufficient reason being shown, the court may draw an inference adverse to the prosecution."

We are of settled mind that, given the circumstances of this case, this is a fit case to draw an adverse inference against the prosecution for their failure to call Jackson who could have clarified to the trial court about what transpired at the scene of crime being the first person to rush there. Finally, the unassailed defence of the appellant that he was merely suspected accused to be a thief and forced to surrender himself to the police did cloud a shadow of doubt on the prosecution case. It is very probable that being a stranger in the vicinity, this made the crowd to suspect him as the culprit which was not the case.

In view of what we have endavoured to discuss, guided by the principle laid down in **FATEHALI MANJI VS REPUBLIC** (supra), we agree with the appellant's counsel that this is not a fit case for ordering a retrial or else it would be utilised by the prosecution to fill the extensive gaps and defects which is not on the interest of justice. We invoke revision powers under section 4 (2) of the Appellate Jurisdiction Act [CAP 141 RE. 2002] to nullify the trial proceedings and judgment, quash and set aside the conviction and sentence

and order the immediate release of the appellant unless if he is held for another lawful cause.

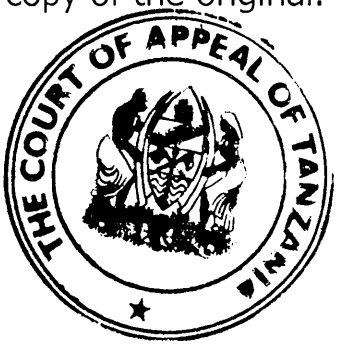
DATED at **MBEYA** this 17th day of September, 2021.

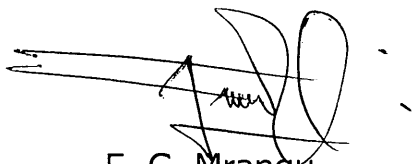
S. E. A. MUGASHA
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

This judgment delivered this 17th day of September, 2021 in the presence of the Appellant in person and Mr. Hebel Kihaka, learned Senior State Attorney for the Respondent / Republic also holding brief of Ms. Irene Joel Mwakyusa, learned advocate for the appellant, is hereby certified as a true copy of the original.





E. G. Mrangu
DEPUTY REGISTRAR
COURT OF APPEAL