IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

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

CRIMINAL APPEAL NO. 394 OF 2018

GALULA s/o NKUBA @ MALAGO..... 1st APPELLANT

NOGELE s/o MALIGANYA @ HAMBOHAMBO..... 2nd APPELLANT

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS..... RESPONDENT

(Appeal from the Decision of the High Court of Tanzania

at Mpanda)

(Mambi J.)

Dated the 5th day of May, 2018

in

Criminal Sessions Case No. 72 of 2016

.....

JUDGMENT OF THE COURT

13th & 17th September, 2021

GALEBA, J.A.:

Galula s/o Nkuba @ Malago and Nogele s/o Maliganya @ Hambohambo the first and second appellants respectively, were charged before the High Court of Tanzania at Mpanda on one count of murder contrary to sections 196 and 197 of the Penal Code [Cap 16 R.E. 2002] now [R.E. 2019] (the Penal Code) following a brutal murder of Grace Zomba, the deceased in the evening of 29th November 2014. They were found guilty, convicted of the murder and were subsequently sentenced to suffer death by hanging. Aggrieved with that decision, they have preferred the present appeal to challenge both the conviction and sentence.

A brief background to this matter in terms of the record of appeal, is that on 29th November 2014, the deceased while at her home at Iziwasungu Village within Mlele District in Katavi Region, she noted that her child was ill. At around 20:00 hours she went out in the vicinity of her house to get some local herbs for treatment of the sick child. As soon as she got out of the house, she met two persons who violently struck her upper limbs and hit her with some heavy weapon on the head breaking her skull leaving the brain draining out. She soon thereafter, passed on. Theresia Sigela and Jane Choma PW1 and PW2 respectively alleged to have identified the assailants to be the appellants. PW1 stated that, as there was moonlight, she managed to identify the first appellant as he was wearing a pair of shorts and black t-shirt and he was the one who was cutting the deceased. According to PW2, the first appellant wore jeans trousers and a black t-shirt and she heard him telling the deceased to say her final prayers before she could be killed.

The incident was reported to the police on the same day and Inspector Mashauri PW4 went to the scene of crime the same night and found the body of the deceased with deep cut wounds and PW1 told him that it was the appellants who were responsible for the murder. Although the police arrived at the scene of crime in the same night of the murder, the appellants were arrested about six months later on 21st May 2015. The appellants were subsequently charged and denied committing the offence but all the same,

the duo were convicted as charged and were consequently sentenced as indicated earlier on.

This appeal was originally predicated on 5 grounds of appeal as per the memorandum of appeal that was lodged by the appellants on their own without assistance of an advocate on 4th January 2019, but on 8th September 2021, through Mr. Baraka Mbwilo, learned advocate, they lodged another memorandum with two grounds of appeal, which at the hearing the said advocate moved us to consider the new grounds in lieu of the former. The two grounds of appeal that the learned advocate beseeched us to consider are that;

> *"1. That the honorable trial judge of the High Court erred in law in failure to follow proper procedure of the law on participation of assessors, that is to say, selection, giving the chance to the appellants to object to the presiding assessors, informing and explaining their roles and responsibilities and finally explaining to them on vital points of law from the evidence on record. The failure rendered the whole proceedings a nullity.*
>
> *2. That the honorable trial judge of the High Court erred in law and fact when he convicted and sentenced the appellants basing on unreliable and weak evidence of identification of PW1 and PW2."*

At the hearing of this appeal, as indicated above the appellants were represented by Mr. Mbwilo while the respondent, Director of Public Prosecutions (the DPP) had the services of Mr. Pascal Marungu, learned Principal State Attorney assisted by Mr. Lugano Mwasubila, learned State Attorney.

In respect of the above first ground of appeal Mr. Mbwilo referred us to four areas where, according to him, the trial judge erred. **First**, the trial court did not procedurally select assessors, **second**, the appellants were not given a right to object to any of the assessors, **third**, the assessors were not advised of their roles and responsibilities prior to participating in the proceedings and **fourth,** the trial judge did not address assessors on vital points of law involved in the case.

Elaborating on the above points Mr. Mbwilo contended that at page 14 of the record of appeal, it does not show that the trial court selected assessors as required by sections 283 and 285 of the Criminal Procedure Act [Cap 20 R.E. 2019] (the CPA) and the appellants were not asked as to whether they had any objection to any of the assessors.

As for failure to address assessors as to their roles, he submitted that there is nowhere in the record where the court explained to assessors as to their duties and responsibilities in the trial. He contended that the omission

was unlawful and he relied on the cases of **Hilda Innocent v. R,** Criminal Appeal No. 181 of 2017, **Lazaro Katende v. DPP,** Criminal Appeal No. 146 of 2018 and **Philemon Zacharia Laizer v. R,** Criminal Appeal No. 133 of 2019 (all unreported).

As for failure to direct assessors on the vital points of law involved in the case, Mr. Mbwilo submitted that the omission was fatal, citing the case of **Khamis Abdul Wahab Mahmoud v. DPP,** Criminal Appeal No. 496 of 2017 (unreported). In this case, he argued, as the offence was committed at night, the trial judge was duty bound to address assessors on the intricacies of visual identification (as a vital point of law) and legal requirements before relying on evidence based on such kind of identification. As the trial court failed to address assessors as required by law, he urged the Court to nullify the proceedings, quash the conviction and set aside the sentences, adding that in appropriate circumstances, he would have prayed for the case to be tried *de novo* by the High Court, but due to the poor quality of the prosecution evidence on record, as he would argue in support of the second ground of appeal, he beseeched us, to allow the appeal with orders that the appellants be acquitted.

In respect of the second ground of appeal, Mr. Mbwilo submitted that the evidence of PW1 and PW2 who were eye witnesses was too weak to have been relied upon by the court to found a valid conviction. Elaborating

on that point, he submitted that as the crime was committed during the night, before accepting the evidence of eyewitnesses in such circumstances as credible, the witnesses were supposed to testify in details, on the intensity of the moonlight which PW1 testified to be the source of light, the distance between the assailants and the witnesses, the period that the witness spent observing the appellants, among other requirements. In supporting his position, he relied on the cases of **Julius Charles @ Sharabaro and Two Others v. R**, Criminal Appeal No. 167 of 2017 and **Philemon Jumanne Agala v. R**, Criminal Appeal No. 187 of 2015 (both unreported).

Based on the above submissions, Mr. Mbwilo, prayed that the appeal be allowed with orders that the appellants be acquitted.

In reply to the above grounds of appeal, first and foremost Mr. Marungu, informed us that he was supporting the appeal. He supported all that counsel for the appellants submitted, including a prayer made to allow the appeal and acquit the appellants, adding that this matter is not a fit case for retrial because, the evidence on record is very wanting.

In our view, the issues for consideration in this appeal are two. **One,** is whether the High Court committed errors of law procedurally in selecting assessors and in terms of addressing them as to their roles and vital points

of law. **Two**, whether the evidence of PW1 and PW2 identifying the appellants relying on moonshine was credible evidence, in law.

With the advantage of the submissions of counsel for both parties and a full mastery of the record of appeal, particularly the record of the prosecution case, we are now in a position to deliberate on the grounds of appeal, in the context of the above issues, starting with the first ground of appeal complaining of the manner the assessors were involved in the trial. To appreciate our consideration of this ground, it is appropriate, we think, to quote the substance of the proceedings as recorded at pages 13 to 14 of the record of appeal. It states:

> ***"Date: - 29.10.2018***
>
> ***Coram:*** *Hon. Dr. A. J. Mambi, J.*
>
> ***For Republic:*** *Lugano, State Attorney*
>
> ***For Accused:*** *Elias Kifunda, Adv.*
>
> ***1st Accused:*** *Present*
>
> ***2nd Accused:*** *Present*
>
> ***Interpreter:*** *Mr. A. Chitimbwa English into Kiswahili and vice versa.*
>
> ***1.*** *Andrea Majilafu*
> ***2.*** *Maria Kapani*
> ***3.*** *Mahamod Shabani*
>
> *Information is read over and explained to the accused persons in Kiswahili language.*
>
> ***Republic:*** *My Lord I am Lugano for the Republic. We also have Kifunda for the defence.*

Prosecution: *Before we call the witness, we pray the accused person to be reminded of the charge.*

Court: *The accused are reminded of the charge and plead as follows;*

1st Accused (Galula): *SIYO KWELI*

2nd Accused (Nogela): *SIYO KWELI*

Court: *Court enters Plea of Not Guilty to all accused persons.*

Prosecution: *We pray to call our first witness.*

Court: *The first witness (PW1) is called.*

PW:-

Name: *Theresia Sigela."*

After the above record, the court continued to record evidence from all the four (4) prosecution witnesses and two (2) from the defence. According to the above excerpt three things pop up to the surface. **One**, the assessors were invited to participate in the trial before a plea was taken. This is offensive of section 283 of the CPA which provides that:

> *"283. Where the accused person pleads "not guilty" or if the plea of "not guilty" is entered in accordance with the provisions of section 281, the court shall proceed to choose assessors, as provided in section 285, and to try the case."*

That is to say, assessors can only appear on record after a plea of not guilty has been entered. **Two**, it is not shown that assessors having been joined the court, were advised of their roles. **Three,** it is clear that the court

started to record the evidence without inquiring from the appellants whether they had any objection with any of the assessors.

Legally, it is mandatory for the High Court hearing criminal cases in exercise of its original jurisdiction to hold such trials with aid of assessors in the context of section 265 of the CPA which provides that:

> *"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."*

For assessors to be taken as having aided the trial court, they must be acquainted with their roles and duties in the trial into which they are selected to participate. The consequences of not addressing assessors as to their roles before they can be called to participate in case, were pronounced in the case of **Hilda Innocent** (supra) as being meaningless participation. In that case the Court stated that:

> *"... although informing the assessors on their role and responsibility is a rule of practice and not a rule of law, as it is for a long time an established and accepted practice in order to ensure their meaningful participation, a trial judge must perform this task immediately after ascertaining that there is no any objection against any of the assessor by the accused before commencing the trial. It is also a sound practice that a trial judge has to show in the record*

that this task has been fully performed. For even logic dictates that whenever a person is called upon to assist in performing any task or to offer any service, he must be fully informed of what is expected of him in performing that task. Thus, failure to inform assessors on their role and responsibility in the trial, diminishes their level of participation and renders their participation which is a requirement of the law meaningless."

We fully subscribe to the above position. We hold that the trial before the High Court was in effect without aid of assessors because the judge did not address them as to their roles which omission seriously impaired their ability to actively participate in the trial and give informed opinion. If a case must be tried with aid of assessors and it is tried without their aid, like in this case, the trial is a nullity - see **Said Mshangama Asenga v. R,** Criminal Appeal No. 8 of 2014, **Halfan Ismail @ Mtepela v. R,** Criminal Appeal No. 38 of 2019 and **Khamis Rashid Shaaban v. The DPP,** Criminal Appeal No. 284 of 2013 (all unreported).

The other point was that the trial judge did not point out to the assessors that the case would fail or succeed based on the weakest kind of evidence: the evidence of visual identification of the appellants during the night. In this case we have critically examined the summing up notes running from page 40 to page 53 of the record of appeal, and it is evident that

throughout those pages there is no mention of the phrase visual identification leave alone, the conditions that need to be fulfilled before evidence base on it can be relied upon. In our view, the issue of visual identification was a vital point of law, meriting to be addressed to the assessors in respect of what elements should be proved for such evidence to be acceptable as a basis of determining the guilt or otherwise of the appellants. That, the trial judge did not do.

Legally, a trial without assessors being addressed on the vital points of law, where such points are involved, is the same as a trial without aid of assessors, and the consequences are fatal to the entire trial and its outcome. In the case of **Tulubuzya Bituro v. R** [1992] TLR 264 it was held that: -

> *"...in criminal trials in the High Court, where assessors are misdirected on a vital point, such trial cannot be construed to be a trial with aid of assessors. The position would be the same where there is non-direction of assessors on a vital point."*

In this case there was non-direction to assessors on a vital point and without any further ado, we wish to state here and now that, by that omission, sections 265 and 298(1) were, in the circumstances, violated. The trial in this case, therefore, was no better than a trial without aid of assessors and it was a nullity.

On failure to give the appellants a right to object to assessors, as it happened in this case, the Court in the case of **Laurent Salu and 5 others v. Republic,** Criminal Appeal No. 176 of 1993 (unreported), stated the significance of sticking to that principle, where it observed that:

> *"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 criminal justice in this country. The rationale for the rule is fairly apparent. The rule is designed to ensure that the accused person has a fair hearing...Thus, in order to ensure a fair trial and to make the accused person have confidence that he is having a fair trial, it is of vital importance that he is informed of the existence of this right."*

In the above quotation the Court stated that it is an established rule of procedure to inform an accused of his right to object to any assessors. The rationale is inbuilt in the same quotation, it is to ensure fairness in criminal justice administration.

For the above irregularities surrounding the participation of assessors in the trial of the appellants before the High Court, both counsel were of a common position that the trial was vitiated to the core and they implored the Court to nullify the proceedings and the judgment, to quash the

conviction and set aside the sentence of death imposed upon the appellants. None of them however, moved us to remit the matter to the High Court for retrial as it always happens especially from the respondent's side. They both instead, prayed that the appeal be allowed and the appellants be set to liberty from the death row because, even if the matter will be remitted to the trial High Court for trial *de novo*, still there will be no evidence upon which the appellants will legally be convicted. The reason they advanced to us in unison, is the poor quality of the evidence of PW1 and PW2, the point we will soon get to for consideration. Based on the submissions of counsel, the first ground of appeal has merit and we uphold it.

Next for consideration is the second ground of appeal. Whether the trial court convicted the appellants on weak evidence of PW1 and PW2. According to the evidence of these witnesses the deceased was killed during the night and there was no man-made source of light like electricity, lantern lamps or torches which would aid them to certainly identify the appellants. However, PW1 stated at page 16 of the record of appeal that:

> *"The deceased was killed at 20hrs, though it was night I recognized the accused persons through moonlight and I knew them before."*

PW2, did not mention anything pertaining to light or its source, she just stated at page 18 of the record of appeal that:

"I saw them since they came twice, and I heard and recognised their voice."

Before getting to the nucleus of this discussion, we must have in our mind what was held in the case of **Waziri Amani v. R** [1980] TLR 250. In that case, about the weakness and unreliability of the evidence taken in circumstances impairing human visibility, like nights, the Court held that:

"Evidence of visual identification is not only the weakest kind, but it is aiso most unreliable and a court should not act on it unless all possibilities of mistaken identity are eliminated and it is satisfied that the evidence before it is absolutely water tight."

That is the general caution that courts should observe when receiving evidence of witnesses who witnessed crimes during the night or in other unfavourable circumstances tending to impair visibility. In the case before us there was moonlight according to PW1, but the witness did not explain the intensity of the light from the moonshine. In the case of **Ponsian Joseph v. R,** Criminal Appeal No. 200 of 2015 (unreported), this Court held that:

"Though under certain circumstances identification by moonlight may be possible, it was imperative in the circumstances to explain the intensity of the moonlight. Whereas PW2 merely said there was moonlight, the complainant said there was 'enough moonlight,' it is our

considered view that it does not suffice to say there was moonlight or enough moonlight. Its brightness had to be explained."

The same principle was followed in **Julius Charles** case (supra), and we have no reason to depart from the settled principle, because in this case like in both **Ponsian Joseph** (supra) and **Julius Charles cases** (supra), the intensity or brightness of the moonlight was not described leave alone the fact that PW2 never even mention any source of light. The unreliability of the evidence of PW1 and PW2 is also complemented by their contradictory accounts on what was the first appellant wearing during the material night one stating that he was wearing shorts and another mentioning a pair of trousers. In the circumstances we uphold the second ground of appeal, that the conviction of the appellants was based on weak evidence of the PW1 and PW2.

In conclusion, we find that the omissions of the trial court in relation to assessors and summing up to them rendered the entire trial a nullity and the conviction based on the evidence of PW1 and PW2 was illegal. In the event, we nullify the entire proceedings and judgment of the High Court in Criminal Sessions Case No. 72 of 2016. Likewise, we quash the conviction and the sentences of death imposed upon the two appellants. Ultimately, we

acquit them and order their immediate release from prison unless they are held there for some other lawful cause.

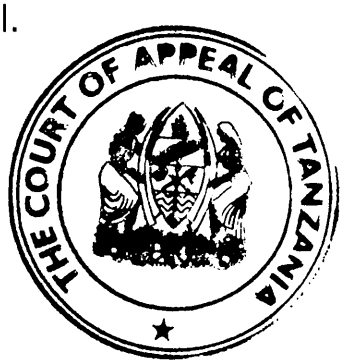
DATED at **MBEYA**, this 17th day of September, 2021

S. E. A. MUGASHA
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

The Judgement delivered this 17th day of September, 2021 in the presence of appellant in person and Helbel Kihaka, learned Senior State Attorney for respondent/Republic also holding brief of Mr. Baraka Mbwilo learned advocate for the appellants is hereby certified as a true copy of the original.



E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL