IN THE COURT OF APPEAL OF TANZANIA

AT IRINGA

(CORAM: MWARIJA, J.A., KWARIKO, J.A., And MWAMPASHI, J.A.)

CRIMINAL APPEAL NO. 254 OF 2019

AHAZI KILOWOKO ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Iringa)

(Matogolo, J.)

dated the 30th day of July, 2019
in
Criminal Sessions Case No. 102 of 2016

JUGMENT OF THE COURT

13th & 21st September, 2021

MWARIJA, J.A.:

The High Court of Tanzania sitting at Iringa convicted the appellant, Ahazi Kilowoko of the offence of murder contrary to s. 196 of the Penal Code [Cap. 16 R.E. 2002, now R.E. 2019]. He was found guilty of having murdered one Thadei Lukungu. Following his conviction, he was sentenced to suffer death by hanging. Aggrieved by the decision of the trial Court, the appellant has preferred this appeal.

The background facts leading to the arraignment and the ultimate conviction of the appellant may be briefly stated as follows: On 2/4/2016,

the body of Thadei Lukungu (the deceased) was found lying in the sitting room of his house at Kilolo Village within Mufindi District in Iringa Region. The incident was reported to the police and immediately thereafter, investigation was carried out to establish the cause of the deceased's death.

No. E. 9803 Detective Corporal Pendo, who testified as PW1, was one of the police officers who conducted investigation. She went to the deceased's home and upon her examination of the deceased's body, she found that it had big wounds on the head. She interrogated some of the village leaders and the deceased's wife, one Sarafina. The appellant was named as the suspect on account of having been heard complaining, prior to the date of the incident that the deceased, who was his father in-law, was bewitching the appellant's children and wife.

The appellant was traced but could not immediately be found. He was later on 25/6/2016, arrested by militiamen and taken before the Kilolo village authorities who thereafter informed the police. Consequently, upon the directive of the OC/CID Mafinga, the police officers from Igowole Police Post went to the village and after re-arresting the appellant they took him to Mafinga Police Station.

On 26/6/2016, PW1 recorded the appellant's cautioned statement (Exhibit P3) and on 28/6/2016 she took him before the Justice of the Peace for the purpose of recording an extra-judicial statement. On the said date, the appellant was taken before Sekela Eden Kyungu, who was at the material time a Primary Court Magistrate, Mafinga.

Testifying in the High Court as PW2, Sekela Eden Kyungu stated that after the appellant had been taken before her, she followed the requisite procedure of knowing whether he was willing to record his statement. Having ascertained that he had volunteered to do so, she proceeded to record the appellant's confession (exhibit P4). She added that, after having recorded the statement, she read it out and the appellant signed it.

In his defence, the appellant denied the charge. He was the only witness for the defence (DW1). His evidence was to the following effect:- He learnt about the death of the deceased on 2/4/2016 after having been informed by one Elly Masehe through telephone conversation. Having received that information while he was at Makambako, he travelled back to Kilolo on the same day and arrived at about 3.00 p.m. He then went to attend the mourning at the deceased's home where, he said, he met the deceased's relatives including his son, Ben Lukungu.

It was the appellant's further evidence that, after the burial ceremony which took place on 3/4/2016, he returned to Makambako to finish the assignment which took him there before the death of the deceased. He returned back to Kilolo on 23/6/2021 and after about three days, he was arrested by two militiamen who took him before the Village Chairman and the Village Executive Officer. He was informed that he was suspected of having killed the deceased and despite his denial, the police arrived and took him to Igowole and later to Mafinga Police Station.

He challenged the evidence of the two prosecution witnesses who recorded his cautioned and extra-judicial statements contending that he did not make either of the two confessions voluntarily. He said that, as for the cautioned statement, after PW1 had asked him and replied to the questions relating to his personal particulars, family details and the leaders of his village, he required him to sign the paper on which she was recording his answers. When he showed reluctance to sign the document whose contents were not known to him, PW1 threatened to take him to a place known as Garage. Because he had seen his fellow suspects coming from that place trudging, he decided to sign the documents on fear.

As for the extra-judicial statement, he contended that he decided to sign it because PW1 who took him before PW2 was standing on the door

of her office and because PW1 had previously warned him of the consequences which he would suffer if he refused to confess, he decided to sign what was recorded in that document notwithstanding the fact that the contents were not read out to him.

In its judgment, the trial court (Matogolo, J.) acted on the cautioned and extra-judicial statements to found the appellant's conviction. The learned trial Judge was of the view that, although both statements were repudiated by the appellant, the confessions were nothing but the truth. The learned trial Judge considered also the evidence to the effect that the appellant disappeared from the village after the deceased's death as a factor which points to the appellant's guilt. On the *alibi* raised by the appellant, the trial court found that, since the same was not supported by any evidence, the same could not raise any reasonable doubt in the prosecution evidence.

As pointed out above, the appellant was dissatisfied with the decision of the High Court and thus filed this appeal. In his memorandum of appeal, he raised a total of nine grounds of his complaint and later on, he filed a supplementary memorandum consisting of seven grounds. On 8/9/2021 however, his advocate filed a substituted memorandum of appeal in terms of Rule 73 (2) of the Tanzania Court of Appeal Rules,

2009 as amended. The substituted memorandum consists of four grounds of appeal as follows:

> *"1. The trial of murder against your humble appellant was not fairly conducted as the trial Honourable Judge failed to inform the assessors on their role and responsibility immediately after their selection.*
>
> *2. The Honourable Judge erred in law by failing properly to direct the assessors on vital points of law relating to the case during summing up.*
>
> *3. The Honourable Judge erred in law in convicting your humble appellant with the offence of murder basing on exhibits P3 and P4 without warning himself on the danger of acting upon the said exhibits.*
>
> *4. That from the evidence on record, the Honourable Judge erred in law in convicting your humble appellant with the offence of murder while the case was not proved beyond reasonable doubt."*

At the hearing of the appeal, the appellant was represented by Mr. Jally Willy Mongo, learned counsel while the respondent Republic was represented by Ms. Twide Mangula, learned Senior State Attorney.

As stated above, whereas the appellant had previously filed his memoranda of appeal, after Mr. Mongo had been assigned the brief in this case, he filed a substituted memorandum of appeal. The learned counsel informed the Court that after having consulted the appellant, they agreed to abandon the grounds filed by him. Mr. Mongo thus proceeded to argue the grounds of appeal contained in the substituted memorandum of appeal.

In the 1st and 2nd grounds of appeal, the appellant's complaint is, first, that the trial court did not inform the assessors of their role and responsibilities at the trial and secondly, that in his summing up, the learned trial Judge did not direct the assessors on vital points of law involved in the case.

We wish to begin with the ground that the assessors were not addressed on vital points of law. In his submission, Mr. Mongo argued that from the record, during his defence, the appellant raised an *alibi,* that on the date of the incident, he was away from his home in Kilolo Village, having travelled to Makambako. In his summing up to the assessors however, the learned counsel submitted, the assessors were not addressed on the nature and application of that maxim. The appellant's counsel argued further that, although in arriving at its decision, the trial

court relied on the evidence of the appellant's cautioned and extra-judicial statements which were repudiated by the appellant, the assessors were neither informed of the nature of that evidence and the conditions under which such evidence may be acted upon to found conviction, including the requirement that such evidence must be corroborated.

Relying on the Court's decisions in the case of **Msafiri Benjamin v. Republic,** Criminal Appeal No. 549 of 2020 (unreported) in which the Court stated the effect of a failure by the trial court to address the assessors on the points of law concerning *alibi* and the cases of **Muhangwa Simon v. Republic,** Criminal Appeal No. 480 of 2019 and **Michael Yohani @ Babu & Another v. Republic,** Criminal Appeal No. 95 of 2017 (both unreported) concerning the effect of a failure by the trial court to direct the assessors on the nature and situations under which repudiated or retracted confession may be acted upon to found an accused person's conviction, the learned counsel argued that the omission is fatal. He thus urged us to allow that ground of appeal and consequently, nullify the proceedings, quash the judgment and set aside the sentence.

On the way forward, Mr. Mongo submitted that, ordinarily, where the proceedings are nullified on account of a trial which is a nullity or on

the ground of a defective trial, a trial *de novo* is to be ordered. In the particular circumstances of this case however, Mr. Mongo argued, it will not be in the interests of justice to order a retrial. This, he said, is because the evidence acted upon to convict the appellant was insufficient. He proceeded to give the reasons for his contention on the 3rd and 4th grounds of appeal.

His argument on those grounds of appeal is that the trial court erred in acting on the evidence of the appellant's cautioned and extra-judicial statements, the confessions which were repudiated by the appellant on the ground that the same were not made voluntarily. He argued further that, although in his defence, the appellant maintained that both the cautioned and extra-judicial statements were not made voluntarily, the trial court did not determine that issue.

Responding to the arguments made in support of the 2nd ground of appeal, the learned Senior State Attorney conceded that the omission to direct the assessors on vital points of law is a fatal irregularity. She however, differed with the appellant's counsel as regards the way forward. She prayed that a retrial should be ordered because the evidence tendered by the prosecution is sufficient to found the appellant's conviction.

Having considered the submissions of the learned counsel for the parties, we agree with them that the learned trial Judge did not, with respect, direct the assessors on vital points of law. The omission, in our view, suffices to determine the fate of the proceedings. As submitted by Mr. Mongo, in its judgment, the trial court acted on the confession evidence which was repudiated by the appellant but the assessors were not told of the nature and the conditions under which such type of evidence may be acted upon to convict an accused person. The trial court did not also address the assessors on the *alibi* which the appellant had raised in his defence.

It is a correct position as agreed by the learned Senior State Attorney that the requirement of directing assessors on vital points of law is a mandatory duty. In the case of **Masolwa Samwel v. Republic,** Criminal Appeal No. 206 of 2014 (unreported) for example, the Court had this to say:

> *"There is a long and unbroken chain of decisions of this Court which all underscore the duty imposed on trial High Court Judges who sit with the aid of assessors to sum up adequately to those assessors on all vital points of law . . ."*

It is trite law further, that the omission to direct the assessors on vital points of law vitiates the trial. See for instance, the cases of **Omari Katesi v. Republic,** Criminal Appeal No. 508 of 2017, **Philemon Zakaria Laizer v. Republic,** Criminal Appeal No. 133 of 2019, **Said Mshangama @ Singa v. Republic,** Criminal Appeal No. 8 of 2014 (all unreported) and **Tulibuzya Bituro v. Republic** [1982] T.L.R. 265. In the first case, like in the case at hand, the assessors were not directed on *inter alia* the points of law concerning repudiated confession and *alibi.* The Court held as follows on the effect of the omission.

> *"We have shown that the trial Judge erred by her failure to direct the assessors on vital points of law. There is a plethora 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 whole proceedings."*

On the way forward, it is an established principle that where there is a failure by a trial court to direct assessors on vital points of law, the remedy is to nullify the proceedings, quash judgment and conviction, set aside sentence and order a trial *de novo.* However, there are particular situations where a fresh trial of a case may be impracticable. In such situations, the Court has found it appropriate to leave the proceedings up to the summing up stage intact, quash only the summing up proceedings

and those following from that stage and order the trial court to sum up the case afresh to the assessors. For instance, in the case of **The Director of Public Prosecutions v. Ismail Shebe Islem & 2 Others,** Criminal Appeal No. 266 of 2016, (unreported) having found that a retrial would be difficult because the exhibits which were tendered in the first trial had been disposed of, instead of nullifying the whole proceedings, the Court nullified only the summing up proceedings, quashed the judgment and set aside the sentence then ordered that a fresh hearing be conducted by another Judge and a new set of assessors from the stage of summing up.

In another instance, in the case of **Mashaka Athumani @ Makamba v. Republic**, Criminal Appeal No. 107 of 2020, the Court took that approach after having considered, among other things, that if retrial was to be ordered, the appellant would stand trial for the third time, a retrial having been previously ordered thus subjecting him to about ten years of standing trial. The Court also looked into the possibility of difficulty in procuring witnesses. Instead of nullifying the whole proceedings, it nullified them from the stage of the summing up and proceeded to order that a fresh summing up be conducted by the same trial Judge sitting with the same set of assessors.

In the particular facts of the case at hand, we find that the factors which were acted upon in the above cited cases do not apply. In the circumstances, after having considered the submissions made by the learned counsel for the appellant and the learned Senior State Attorney, we are of the view that it is appropriate to order a retrial. We thus hereby nullify the proceedings, quash the judgment and conviction and set aside the sentence. Consequently, we order that the case be tried *de novo* before another Judge sitting with a new set of assessors. Meanwhile, the appellant shall remain in custody pending his retrial.

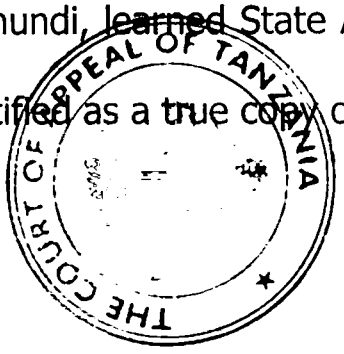
DATED at **IRINGA** this 21st day of September, 2021.

A. G. MWARIJA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The Judgment delivered this 21st day of September, 2021 in the presence of Mr. Jally Mongo, learned counsel for the Appellant and Ms. Margreth Mahundi, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.



S. J. KAINDA
DEPUTY REGISTAR
COURT OF APPEAL