IN THE COURT OF APPEAL OF TANZANIA
AT MBEYA

(CORAM: NDIKA, J.A., SEHEL, J.A., And KENTE, J.A.)

CRIMINAL APPEAL NO. 331 OF 2018

WASIWASI HANDISON MWASHITETE ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of High Court of Tanzania at Mbeya)

(Ngwala, J.)

dated the 7th day of August, 2018
in
Criminal Sessions Case No. 75 of 2014

.....

JUDGMENT OF THE COURT

15th & 22nd September, 2021

NDIKA, J.A.:

The appellant, Wasiwasi Handison Mwashitete, was on 7th August, 2018 found guilty of murdering his elder brother, Seme Handison Mwashitete ("the deceased"), following his trial by the High Court of Tanzania sitting at Mbeya (Ngwala, J.). He was duly convicted and, accordingly, sentenced to suffer death by hanging. He now appeals against conviction.

It was without dispute that the deceased met a violent death on 28th May, 2013 at Lumbila village within Mbozi District and Region of Mbeya. According to a post-mortem examination report (Exhibit P.1) on his body

tendered in evidence by Dr. Juma Matumba (PW3), whose contents were not gainsaid, the death resulted from massive bleeding due to severe head injury caused by a blunt object. The body exhibited a *"fracture of the distal part, bruises around the neck, traumatic cut wound on the parietal, crushed burst wound in the frontal area radiating to the occipital and maxilla areas."* The question at the trial was, consequently, whether the appellant was the murderer, its determination being based on purely circumstantial evidence.

To prove the charge, the prosecution presented seven witnesses along with the aforesaid post-mortem examination report. On the part of the appellant, he gave evidence on oath without calling any witness.

Briefly, the prosecution case was as follows: Mawazo Mwashitete (PW1), the deceased's younger brother, was at his home in Lumbila village on 28th May, 2013 at 20:00 hours when he heard screams coming from a nearby road. He walked out to find out what the matter was. On the way, he unexpectedly met a person walking away from the road. With the aid of light from a paraffin lamp at his home which sufficiently illuminated the point where they met, he recognised that person as the appellant. The appellant called for his attention, saying *"Brother, brother ..."* and then told him to go the road, uttering in Swahili, *"Kaangalieni mzoga wenu",* literally meaning *"Go and see your carcass."* A short while later, PW1 went to the point on the road where the

screams came from and found a number of people crying and calling out the deceased's name. He saw the deceased's lifeless body lying on the road. The police were called that night and the body was later taken to hospital for examination and preservation.

PW1 adduced further that the appellant disappeared from the village that fateful night and that he did not attend the interment of the deceased's body done at the village on the following day. He also recounted that there was a feud between the appellant and the deceased following the latter's defiance to pay the former an owing sum of TZS. 70,000.00 being proceeds of sale of fuel. The deceased's eldest brother, PW4 Finias Handison Mwashitete, who also went to the scene after he learnt of the killing, confirmed the bad blood between the appellant and the deceased as well as the appellant's disappearance from the village.

The deceased's paternal uncle, Elia Ironge Mwashitete (PW2), was the patriarchy of the family following the passing, years earlier, of the deceased's father, his brother. Apart from confirming the appellant's disappearance, he testified that while the appellant was away he called him on phone, at least on three occasions, pleading that he be pardoned for killing the deceased. The appellant called him on the third occasion about three months after the deceased's death around the time of a burial of a family member, the late

Rajab Wilson Mwashitete. PW2 advised him to surrender to the police instead of risking death by returning home. Upon that advice, the appellant submitted himself to the police.

PW6 Gervas Simon Mkondya, a cousin of the deceased, recalled that, on at least two occasions, he saw the appellant pressing the deceased for his money but the latter would not pay up. In the last instance, which was on 27th February, 2013, the appellant gave up but warned, in Swahili, that, *"Hiyo hela siidai tena ila nitaichukua kwa njia yangu",* plainly meaning, *"I won't ask for the money, I will get it through my own way."* On the following day, PW6 learnt of the deceased's death, which was followed up by the appellant's disappearance from the village until when he surrendered three months later. PW6 further told the trial court that when he visited the appellant at the police station after he had surrendered, he said to him that, *"Mie kaka nimejileta hapa kujisalimisha kwamba nilimuua kaka Seme. Nilivyompigia baba simu, baba alisema nije kituoni, atakuja kunitoa,"* literally meaning, *"My brother I have submitted myself to the police because I killed brother Seme. I called paternal uncle, who advised that I surrender to the police and that he would come over to get me released."*

While in police custody, the appellant allegedly made a cautioned statement to police officer No. E.7150 Corporal Mahona (PW5). This statement,

however, was rejected upon the trial court's sustaining an objection to its admissibility the defence had raised. A police investigator, PW7 No. T.6960 Detective Constable Bashani addressed the trial court on various aspects of his investigations but his testimony was mostly hearsay.

The appellant interposed the defence of *alibi* and denial while claiming that he was reliably informed by his wife that the deceased was knocked dead by a motor vehicle. He averred that on the fateful night he was at a local farmers' market popularly known as *mnada* at Sanjele. Later, he learnt from his wife as well as his sister, Chausiku Handison Mwashitete, that the police wanted to arrest him and that some of his armed siblings were looking for him as well. He also called PW2 who similarly advised him against attending the burial. Speaking of PW6, he said that there was bad blood between them and that at some point PW6 threatened to hurt him. However, he said, he had cordial brotherly relations with PW1, his elder brother. Overall, he blamed his predicament on the fact that his siblings begrudged him due to his remarkable business achievements.

The appellant went on acknowledging that he surrendered to the police on 19th June, 2013 as he had decided to attend the burial of his brother who had just been gunned down. However, he felt that it was not safe to go home directly. The police initially released him on the ground that no complaint had

been made against him but they re-arrested him later that day and booked him for the offence of murder.

Following the conclusion of the trial and summing up of the case to the assessors, the assessors returned a unanimous verdict of guilty against the appellant. In her judgment, the learned trial Judge was of the view that the evidence against the appellant was purely circumstantial. She then reasoned, at page 92, that:

> *"one day before the deceased's death the accused person promised to collect the said money from the deceased through his own ways. On the material date of the incident, the accused person sent his friends to collect the money from the deceased. Later on the deceased person was found on the road dead. Thereafter, the accused disappeared and was nowhere to be seen in the village."*

Citing **Kulwa Machibya v. Republic**, Criminal Appeal No. 47 of 1999 (unreported), the learned Judge added that the appellant's strange conduct before and after the murder belied his claim of innocence. She also took into account that the appellant admitted to the murder in his phone calls to PW2. She considered the appellant's defence but rejected it essentially on the ground that he did not contradict the piece of evidence by PW6 that he had issued a threat to collect money from the deceased one day before his violent death.

The appeal was originally predicated on a self-crafted five-point memorandum of appeal lodged on 30th December, 2018. On 9th September, 2021, Mr. Victor C. Mkumbe, the appellant's counsel on dock brief, filed a three-point memorandum of appeal in terms of Rule 73 (2) of the Tanzania Court of Appeal Rules, 2009 in substitution of the earlier memorandum. The said memorandum cited three grounds of complaint, which we need not reproduce herein for the reason that we shall unveil shortly.

At the hearing of the appeal, Mr. Mkumbe adopted a statement of his arguments he had filed in support of the appeal and prayed that the appeal be allowed. Conversely, Mr. Njoloyota Mwashubila, learned State Attorney appearing for the respondent, determinedly supported the conviction and sentence against the appellant. Besides his submissions on the substance of appeal, he sought and obtained leave of the Court to argue a threshold question of significance.

It was Mr. Mwashubila's contention that the trial proceedings were a nullity due to the learned trial Judge's failure to properly sum up the case to the assessors. Referring us to pages 70 to 76 of the record of appeal containing the summing up notes, Mr. Mwashubila posited that the learned trial Judge provided nothing else but a summary of the facts of the cases for the prosecution and the defence without any direction on three vital points which

she considered and decided in her judgment at pages 92 to 96 of the record. First, despite the case hinging on purely circumstantial evidence, the assessors were not directed on the nature and cogency of such evidence. Secondly, no guidance was given on the key ingredients of the charged offence particularly malice aforethought. Thirdly, the relevance of the alleged conduct of the appellant before and after the deceased's death was not addressed.

The effect of the aforesaid omission, Mr. Mwashubila argued, was to render the trial before the High Court a nullity as the case would be deemed to have proceeded without the aid of assessors contrary to the requirement of section 265 of the Criminal Procedure Act, Cap. 20 R.E. 2002 (now R.E. 2019) ("the CPA). Accordingly, he urged us to nullify the trial proceedings and the judgment thereon.

Replying, Mr. Mkumbe disagreed with his learned friend. He supported the approach taken by the learned trial Judge, contending that she rightly provided a précis of the case in accordance with the law, containing the necessary facts for the determination of the main factual issues. When queried by the Court if the assessors were specifically directed on the three vital points pointed out by Mr. Mwashubila, Mr. Mkumbe maintained that the summing up was adequate. He added, without elaborating, that there might have been some omission but it did not detract from the justice of the case.

In the light of the contending submissions of the learned counsel, the sticking issue is whether the summing up was irregular and, if so, whether it rendered the trial unfair, hence a nullity.

At the forefront, it bears reiterating the peremptory requirement under section 265 of the CPA that criminal trials before the High Court must be conducted with the aid of at least two assessors. Furthermore, a trial Judge sitting with assessors is required to sum up the case to the assessors when the case on both sides is closed before inviting their opinion in terms of section 298 (1) of the CPA:

> *"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.****"* [Emphasis added]

We have supplied emphasis to the above phrase *"the judge may sum up the evidence"* to stress the settled position that although the word "may" generally signifies discretion, it has been interpreted as imposing a mandatory duty on the trial Judge to sum up the evidence. Our unreported decision in **Mulokozi Anatory v. Republic**, Criminal Appeal No. 124 of 2014 is illustrative of the position thus:

> *"We wish first to say in passing that though the word 'may' is used implying that it is not mandatory for the trial judge to sum up the case to the assessors* ***but as a matter of long established practice and to give effect to s. 265 of the Criminal Procedure Act*** *that all trials before the High Court shall be with the aid of assessors,* ***the trial judges sitting with assessors have invariably been summing up the cases to the assessors****."* [Emphasis added]

In summing up, the presiding Judge is enjoined to explain all the vital points of law in relation to the relevant facts of the case – see, for example, **Said Mshangama @ Senga v. Republic**, Criminal Appeal No. 8 of 2014; and **Omari Khalfan v. Republic**, Criminal Appeal No. 107 of 2015 (both unreported). In **Masolwa Samwel v. Republic**, Criminal Appeal No. 206 of 2014 (unreported), the Court, having noted that the learned trial Judge omitted to address the assessors in a murder trial on the voluntariness of a confessional statement and the defence of *alibi*, held that:

> *"There is a long and unbroken chain of decisions of the 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.'*** *There is no exhaustive list of what are the vital points of law which the trial High Court should*

address to the assessors and take into account when considering their respective judgments."

In the unreported decision in **Andrea Ngura v. Republic**, Criminal Appeal No. 15 of 2013, the Court underlined that the value of assessors' opinions is dependent upon how informed they are:

> *"Trial by assessors is an important part in all the trials of capital offences in Tanzania. Although, in terms of section, 298(2) of the CPA their opinions are not binding on the trial judge,* ***the value of their opinions very much depends on how informed they could be****."* [Emphasis added]

In the case at hand, we subscribe to the submission by Mr. Mwashubila that the learned trial Judge's summing up was clearly deficient. It is evident from the summing up notes, from pages 70 to 76 of the record, that the learned trial Judge provided a synopsis of the facts of the case, without more. Despite the case turning mainly on circumstantial evidence, the assessors were not directed on its nature and cogency nor were they charged to determine if it irresistibly pointed to the guilt, as opposed to the innocence, of the appellant. To be sure, as shown at pages 93 to 96 of the record, the appellant's conviction was primarily based on the learned trial Judge's reasoning and findings upon pieces of circumstantial evidence on which she received no valuable input from the assessors.

Furthermore, it was a non-direction on the part of the learned trial Judge that she did not address the assessors on the ingredients of the offence of murder particularly the concept of malice aforethought. Despite not doing so, she addressed the issue, as she must have, in her judgment as shown from pages 92 to 93 of the record before concluding at pages 95 and 96. It is evident from pages 77 and 78 of the record of appeal that the assessors returned a unanimous verdict of guilty against the appellant but none of them was able to say if the killing was committed with malice aforethought.

There were still two further non-directions, which Mr. Mwashubila did not point out. The first one concerned the prosecution evidence that the appellant made phone calls to PW2 confessing to the killing and that he made another confessional proclamation to PW6 at the police station. It is evident that in its judgment the trial court relied upon these statements as the appellant's acknowledgment of criminal responsibility but the court had not provided any guidance to the assessors on what in law amounts to an oral admission or confession. Nor were the assessors charged to determine if the statements were incriminating or not.

The second non-direction not pointed out by the learned State Attorney concerned the appellant's defence of *alibi*. Apart from the learned trial Judge summarizing the facts constituting that defence, as shown at pages 75 and 76

of the record, she said nothing about its essence and the underlying burden of proof. Nor did she point out that conviction could not be entered without considering that defence. Unsurprisingly, in giving their opinions, none of the assessors considered any aspect of the fronted *alibi*.

In view of the non-directions committed in the summing up as discussed above, we entertain no doubt that the appellant's trial was vitiated and that it cannot be said to be one conducted with the aid of assessors as envisaged under section 265 of the CPA. The trial was, therefore, a nullity. In exercise of our revisional jurisdiction in terms of section 4 (2) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2002 (now R.E. 2019), we nullify the trial proceedings and the decision thereon. Consequently, we quash the conviction and set aside the sentence imposed on the appellant.

In anticipation of the evidently unavoidable nullification of the trial proceedings, the learned counsel addressed us on the way forward, a question on which they were sharply divided. On his part, Mr. Mwashubila urged that the appellant be retried, contending that, based on the evidence on record, the prosecution case was so strong against him. In clarifying his submission, he reviewed the following pieces of evidence: one, PW1's testimony that the appellant called him on the fateful night to view the deceased's corpse which he called a "carcass". Two, the evidence from PW2 that the appellant called

him on several occasions pleading for forgiveness for the killing. Three, based on PW6 that the appellant issued a threat against the deceased a day before his death and that while he was under arrest at the police station he confessed to the murder.

Mr. Mkumbe, on the other hand, disagreed with his learned friend. He submitted that the prosecution case was built upon weak evidence. His submission was anchored on the following: one, that the alleged threat to the deceased did not amount to a threat to his life. Two, that the appellant's disappearance from home following the deceased's death was sufficiently explained that he was duly warned to stay away or else he would risk his life. Three, that the trial court wrongly founded the conviction on the contents of the abandoned cautioned statement. On this aspect, he referred us, at first, to page 92 of the record, where the learned Judge considered in her judgment that the appellant placed the then unconscious deceased on the road for him to be knocked or die due to lack of medical attention.

We are cognizant that the principles governing retrials as stated by the defunct Court of Appeal for East Africa in **Fatehali Manji v. Republic** [1966] EA 341 preclude a retrial where there was insufficient evidence in the original trial – see also **Selina Yambi & Others v. Republic**, Criminal Appeal No. 94 of 2013; **Salum & Another v. Republic**, Criminal Appeal No. 119 of 2015;

and **Athanas Julius v. Republic**, Criminal Appeal No. 498 of 2015 (all unreported). Furthermore, a fresh trial would be unwarranted if it may end up giving the prosecution an unfair advantage of bridging the gaps even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame.

Having considered the above principles and taken account of the circumstances of the case as well as the gravity of the offence involved, we go along with Mr. Mwashubila's submission that a retrial would be in the interests of justice.

Consequently, we remit the case to the High Court for a retrial before a new Judge and a different set of assessors. In the meantime, the appellant shall remain in remand prison.

DATED at **MBEYA** this 21st day of September, 2021

G. A. M. NDIKA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

This Judgment delivered this 22nd day of September, 2021 in the presence of the appellant and Mr. Victor Mkumbe, learned counsel for the Appellant and Mr. Hebel Kihaka, learned Senior State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.

H. P. Ndesamburo
DEPUTY REGISTRAR
COURT OF APPEAL