IN THE COURT OF APPEAL OF TANZANIA

AT IRINGA

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

CRIMINAL APPEAL NO. 440 OF 2019

BENITO MAKOMBE ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Kente, J.)

dated the 15th day of October, 2019
in
Criminal Sessions Case No. 37 of 2016

JUDGMENT OF THE COURT

15th & 23rd September, 2021

KWARIKO, J.A.:

The appellant, Benito Makombe was arraigned before the High Court of Tanzania sitting at Iringa with the offence of murder contrary to section 196 of the Penal Code [CAP 16 R.E. 2002; now R.E. 2019] (the Penal Code). The particulars of the offence were that, on 13th May, 2014 at Kiumba village within the District and Region of Njombe, the appellant murdered one Salama Mlowe. He denied the charge.

At the trial, the prosecution brought three witnesses, namely: Bryson Timothy Mbago (PW1); ASP Asna Mselem Mtulia (PW2); and Dr. Robert Kinyamagoha (PW3). For his part, the appellant testified on his own behalf and did not call any witness.

At the end of the trial, the court found that the charge was proved beyond reasonable doubt. The appellant was convicted and sentenced to a mandatory sentence of death by handing. He is now before the Court on appeal.

Briefly, the facts of the case which led to the appellant's conviction are as follows. The deceased who was aged thirteen years at the material time, was a nephew of the appellant and the latter took him from his home village to go and work at the home of Bryson Timothy (PW1) as a herdsboy.

On 13th May, 2014 the deceased drove thirteen heads of cattle, the property of PW1 to the bush for grazing. PW1 went to a funeral on promise to join the deceased later but did not make it. When he returned home at 5:30 pm neither the deceased nor the cattle were back home. A search was conducted in vain until the following day when eight heads of cattle were found but the deceased remained missing.

In the process of the search, the deceased's decomposing body was found hanging on a tree on 20th May, 2014 in the same clothes he had worn when he disappeared. Information was sent to the police and through investigation, the appellant was suspected to have participated in the deceased's death. He was arrested and upon interrogation by PW2, he confessed to have killed the deceased in collaboration with one Leckson Mbago. However, he raised a defence of compulsion to the effect that the said Leckson threatened and forced him to participate in the killing to destroy evidence so that Leckson could take away the cattle. The appellant's cautioned statement was recorded and admitted in evidence as exhibit P1.

Meanwhile, in his examination of the deceased's body, PW3 found the cause of death to be asphyxiation. The post-mortem examination report was admitted in evidence as exhibit P2.

In his defence, the appellant maintained that he participated in the killing for fear of being harmed by the said Leckson who was more energetic as compared to him.

In its decision, the trial court rejected the appellant's defence of compulsion as it did not meet the conditions provided under section 17 of

the Penal Code. The appellant was convicted and sentenced as indicated earlier.

Aggrieved by that decision, the appellant filed a total of eleven grounds of appeal in two sets of memoranda of appeal. Whilst on 10th September, 2021, his counsel filed a substituted memorandum of appeal containing four grounds in terms of Rule 73 (2) of the Tanzania Court of Appeal Rules, 2009 as amended as follows:

1. *The honourable judge erred in law and fact by failing to explain to the assessors the evidence adduced by both parties and vital points of law relating to the case during summing up.*
2. *The honourable judge erred in law and fact by relying only on exhibit P1 which was retracted/repudiated in convicting your humble appellant in the absence of extra judicial statement which was neither tendered by the prosecution nor was the recorder (The Justice of Peace) called to give evidence and without assigning reasons for such failure.*
3. *The honourable judge erred in law and fact in disregarding the defence of compulsion raised by your humble appellant which had raised reasonable doubts on the prosecution case.*

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 appeared and was represented by Mr. Jally Willy Mongo, learned advocate, whilst Ms. Rehema Mpagama, learned State Attorney represented the respondent Republic.

When Mr. Mongo rose to argue the appeal, he intimated to the Court that he had agreed with the appellant to abandon the grounds of appeal filed by him and argue the grounds of appeal contained in the substituted memorandum of appeal.

In his submission in respect of the first ground, Mr. Mongo argued that, during the summing up to the assessors, the trial Judge erred in law and fact when he omitted to summarise the evidence from both sides and explain vital points of law to them. He mentioned the repudiated confession and the defence of compulsion as the vital points of law that were not explained to the assessors. He argued that, the omission vitiated the whole proceedings and urged us to nullify them. To fortify his contention, the learned counsel referred us to the case of **Kinyota Kabwe v. R,** Criminal Appeal No. 198 of 2017 (unreported). As to the way forward, Mr. Mongo

urged us not to order retrial of the case as ordinarily would have been because the prosecution evidence is wanting.

The learned counsel explained the shortcomings of the evidence by the prosecution forming the complaints in the second, third and fourth grounds as follows. In the second ground he argued that, while the appellant's cautioned statement was tendered in evidence, no reasons were given for non-production of the extra-judicial statement for the trial court to compare between the two. To fortify his argument, he referred us to the case of **Ndorosi Kudekei v. R,** Criminal Appeal No. 318 of 2016 (unreported). Further, he referred us to section 122 of the Evidence Act [CAP 6 R.E. 2019] and urged us to find that the omission to tender the extra-judicial statement adversely impacted on the prosecution case. He also cited the case of **Issa Reji Mafita v. R,** Criminal Appeal No. 337 'B' of 2020 (unreported) to that effect.

In the third ground of appeal, Mr. Mongo contended that the trial court did not sufficiently consider the defence of compulsion which the appellant had raised. He argued that, the defence ought to have been accepted because the appellant said that Leckson Mbago forced and threatened him to participate in the murder of the deceased. In support of

this argument, the learned counsel cited the decision of the Court in the case of **Said Bakari v. R,** Criminal Appeal No. 422 of 2013 (unreported).

For the foregoing submission, Mr. Mongo argued in the fourth ground of appeal that the prosecution case was not proved beyond reasonable doubt against the appellant. He thus urged us to allow the appeal and release him from custody.

In response to the foregoing, Ms. Mpagama intimated to the Court that she was not supporting the appeal. She argued in respect to the first ground that the trial Judge properly summed up the case to assessors *albeit* in summary form but the assessors understood that is why in the end they gave their opinion.

The learned State Attorney argued in respect of the second ground that, the appellant was convicted on his own confession which was supported by the post-mortem report. She referred us to the case of **Hamis Juma Chaupepo @ Chau v. R,** Criminal Appeal No. 95 of 2018 (unreported). Ms. Mpagama argued further that failure by the prosecution to tender the extra-judicial statement did not adversely impact on the prosecution case. She explained that the prosecution was at liberty to

choose which evidence to bring against the appellant and that each case ought to be treated according to its own set of circumstances.

In the third ground, the learned State Attorney contended that the defence of compulsion was not available to the appellant because he did not prove that he was in imminent danger of death or grievous harm when he participated in the killing of the deceased. That, he had the chance to run away when the said Leckson was chasing the deceased. She thus contended that the trial Judge correctly rejected the defence of compulsion. In support of this argument, Ms. Mpagama cited the case of **Ramadhan Salum v. R,** Criminal Appeal No. 5 of 2004 (unreported).

She concluded her submission in the fourth ground that the prosecution case was proved beyond reasonable doubt by the appellant's confession supported by the post-mortem report.

In his rejoinder, Mr. Mongo reiterated his earlier submission in respect of the first, second and fourth grounds. For the third ground, he argued that the defence of compulsion was proved and that threats should not only be done by a weapon. He contended that in the case at hand, the evidence shows that the said Leckson threatened the appellant before the deceased ran away. On being prompted by the Court, the learned advocate

submitted that, the appellant did not report the incident soon after the killing because he was a new comer to the place where it happened.

Having considered the submissions by the counsel for the parties, we shall begin our determination of the appeal in the first ground. Summing up to the assessors is a requirement of law. Firstly, the law is clear that all trials before the High Court should be with aid of assessors. Section 265 of the Criminal Procedure Act [CAP 20 R.E. 2019] (the CPA) which is relevant here provides thus:

> *"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."*

Further, the requirement of summing up of the case to the assessors is provided under section 298 (1) of the CPA as follows:

> *"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 specific question of fact addressed to him by the judge, and record the opinion."*

Although the cited provision is not couched in mandatory terms, it has been established in our jurisdiction that summing up to assessors is an imperative duty by the trial Judge. See for instance, **Mulokozi Anatory v. R,** Criminal Appeal No. 124 of 2014; **Bakari Selemani @ Binyo v. R,** Criminal Appeal No. 12 of 2019 (both unreported); and **Kinyota Kabwe** (supra).

The provision indicates that, in the summing up, the trial Judge is required to summarize the evidence from both sides and explain any specific questions of fact before the assessors are invited to give their opinion. That notwithstanding, the Judge is also required to explain the ingredients of the offence charged, points of law involved, burden of proof and any possible defences. In the case of **Fadhil Yussuf Hamid v. R,** Criminal Appeal No. 129 of 2019 (unreported), the Court outlined steps to be followed in the trial conducted with the aid of assessors including the following:

> *"The court has to sum up to the assessors at the end of submission by both sides. The summing up to contain a summary of facts, the evidence adduced, and also the explanation of the relevant law, for instance what is malice aforethought. The court has to point out to assessors any possible*

defences and explain to them the law regarding those defences."

Having gone through the law in relation to the summing up to assessors, what follows now is to determine whether the trial Judge in the instant case properly summed up the case. Upon perusal of the summing up notes to the assessors, what is vivid is that the trial Judge listed headings of the matters which needed to be explained to the assessors but short of explaining them. Not even the evidence from both sides was summarized to the assessors. As correctly argued by Mr. Mongo, the mode of summing up by the trial Judge was not up to the standard provided in the cited provisions of the law and interpreted in the various decisions of the Court. The importance of opinion of assessors was stated in the case of **Washington Odindo v. Republic** [1954] 21 EACA 392 where it was stated thus:

"The opinion of assessors can be of great value and assistance to the trial judge but only if they fully understand the facts of the case in relation to the relevant law. If the law is not explained and attention not drawn to the salient facts of the case, the value of the assessors' opinion is correspondingly reduced."

Similarly, in the instant case, failure by the trial judge to properly sum up the case, denied the assessors to fully give fair opinion. The inadequacy summing up to the assessors vitiated the whole proceedings. Some of the Court's decisions to that effect include: **Hamis Basil v. R,** Criminal Appeal No. 165 of 2017; **Jeremiah Paskal Gabriel v. R,** Criminal Appeal No. 185 of 2012 (both unreported); and **Kinyota Kabwe** (supra) cited by the appellant's counsel. For instance, in the case of **Hamis Basil** (supra), we observed that:

> *"As the non-compliance was raised in one of the grounds of appeal, we, accordingly, partly allow the appeal and nullify the entire proceedings of the High Court. The resultant conviction and sentence are, respectively, quashed and set aside."*

In the event, we find merit in the first ground of appeal. Having decided the first ground in the affirmative, the remaining grounds die naturally.

As to the way forward, Mr. Mongo urged us not to order retrial as it would have been ordinarily, for the reason that, the prosecution evidence is wanting. We have considered this preposition and we are of the view that in the circumstances of this case, for the interest of justice, the best option is to order a retrial of the case. We therefore remit the record to

the trial court for a trial *denovo* before another judge and a new set of assessors. In the meantime, the appellant shall remain in custody awaiting his fresh trial.

DATED at **IRINGA** this 22nd 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 23rd day of September, 2021 in the presence of Mr. Jally Mongo, learned counsel for the Appellant and Ms. Radhia Njovu, learned State Attorney for the Respondent, is hereby certified as a true copy of the original.

S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL