IN THE COURT OF APPEAL OF TANZANIA

AT IRINGA

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

CRIMINAL APPEAL NO. 439 OF 2019

JAMES MSUMULE @ JEMBE ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Kente, J.)

dated the 10th day of October, 2019
in
Criminal Sessions Case No. 43 of 2016

JUDGMENT OF THE COURT

15th & 28th September, 2021

MWARIJA, J.A.:

The appellant, James Msumule @ Jembe was charged in the High Court of Tanzania at Iringa with the offence of murder contrary to ss 196 and 197 of the Penal Code [Cap. 16 R.E. 2002, now R.E. 2019] (the Penal Code). According to the information, the appellant murdered one Jacob s/o Kiswaga. It was alleged that the offence was committed on 2/4/2012 at Kinenulo Village within the District and Region of Njombe.

When the information was read to him, the appellant entered a plea of not guilty and therefore, the case had to proceed to a full trial. Having heard the evidence of three prosecution witnesses and that of the appellant, who was the only witness for the defence, the trial High Court (Kente, J., as he then was) found that the prosecution had proved its case beyond reasonable doubt. The appellant was consequently convicted and sentenced to suffer death by hanging. Aggrieved by the decision of the High Court, the appellant has preferred this appeal.

The background facts giving rise to the appeal may be briefly stated. The deceased was until the material date of his death, a resident of Imalinyi Village within the District and Region of Njombe. He was doing the business of transporting chickens to Njombe town for sale. On 30/3/2012, as had been his routine, he left his home at Imalinyi Village for Njombe town with his consignment of chickens for sale. On that day however, he did not return home.

The deceased's wife, Sayuni Stephano (PW1) was perturbed by the deceased's unusual act of failing to return home. Her worries were intensified when on the next day, while at the church area, she met one person, a former councilor, who asked her about the deceased. The said person told her that he had been trying to call the deceased but was not

picking the phone. After that information, on the same day, PW1 reported the incident to the Imalinyi Village authorities.

Milton Ngobasi (PW2) was at the material time the Village Executive Officer. Having received the information, he organized a group of villagers and a search for the deceased began. Later, on 1/4/2012, PW2 reported the incident to the police. As a result of the search conducted by the villagers, on 2/4/2012, the deceased's body was found in the village at TANWAT plantation area. The body which had started to decompose was identified by PW2 because the deceased was known to him. It was also identified by the deceased's brother.

Having discovered the deceased's body, PW2 went to Njombe Police Station to make a report and on the same day, the police went to the scene with a doctor. After the doctor had examined the body, the relatives were advised to burry it. In his evidence, PW2 stated that the deceased's body had wounds on the head and besides it were three chicken cages and blood stained wooden stick.

Apart from the discovery of the body, no one was immediately suspected of having caused the deceased's death. However, on 25/5/2012 at 2:00 p.m. No. E. 4186 D/Cpl Salehe (PW3) received

information that the appellant was involved in the killing of the deceased. At that time, the appellant was under police custody having been arrested on 22/5/2012 in connection with the death of another person, Alice Mtokoma of Usalule Village. Following that development, PW3 was directed by the OC/CID to interview the appellant.

According to his evidence, PW3 interrogated the appellant after he had informed him of his rights whereupon, he said, the appellant volunteered to record a cautioned statement in the presence of one Upendo Mligo his co-suspect in the case relating to the murder of the said Alice Mtokoma. It was PW3's evidence that the appellant confessed to have been involved in killing the deceased in collaboration with one Method Mwanyika who hired him to do so. The witness sought to tender the appellant's cautioned statement in court but the appellant's counsel raised an objection based on two grounds; **first,** that the same was wrongly certified under ss. 58 and 57 of the Criminal Procedure Act, [Cap. 20 R.E. 2002, now R.E. 2019] (the CPA) instead of s. 58 (6) of the CPA. **Secondly,** that the statement was recorded out of the period prescribed under s. 50 (1) (a) of the CPA. The objection was however overruled and the cautioned statement was admitted in evidence as exhibit P3.

In his defence, the appellant opposed the evidence tendered by the prosecution. He testified that, he was arrested by the police on 22/5/2012 on suspicion that he was involved in the murder of Alice Mtokoma. After his arrest, he was taken to Njombe Police Station where, on that same night, he was interviewed. Later on 25/5/2012, he was again interviewed in connection with the murder of the deceased to which he was informed that he was also suspected of have participated in its commission.

He testified further that, at first, when he was interviewed in a room in which he was with PW3 alone, he denied the allegation that he killed the deceased. Later on however, he said, he was taken in the same room and found a woman who was a stranger to him but whom he later came to be known as his co-suspect in another case relating to the murder of the said Alice Mtokoma. He was then required by PW3 to sign an already prepared document before that woman. According to his evidence, at first, he refused to sign it but did so after he had been threatened by PW3.

In his decision, the learned trial Judge found that the case against the appellant was proved beyond reasonable doubt. After having considered in length, the issue whether or not the appellant recorded a cautioned statement before PW3, the learned Judge answered that issue

in the affirmative. He found further that the contents of the cautioned statement are nothing but the truth.

As stated above, the appellant was dissatisfied with the decision of the High Court and therefore, preferred this appeal. In his memorandum of appeal filed on 29/4/2020, he raised eight grounds of his complaint. Later on however, his counsel filed a substituted memorandum consisting of four grounds of appeal. The substituted memorandum was filed under Rule 73 (2) of the Tanzania Court of Appeal Rules, 2009 as amended.

At the hearing of the appeal, the appellant was represented by Mr. Jally Mongo, learned counsel while on the other side, Ms. Rehema Mpagama appeared for the respondent Republic. Before he proceeded to submit in support of the appeal, Mr. Mongo informed the Court that, after having consulted the appellant and agreed with him he would argue the grounds of appeal raised in the substituted memorandum of appeal and abandon the grounds filed by the appellant. The four grounds raised by the learned counsel are 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 P3 which was repudiated by your humble appellant in convicting your humble appellant in the absence of extra judicial statement which was neither tendered by the prosecution nor were reasons for such failure given.*

3. *The honourable Judge erred in law and fact for failure to draw adverse inference against the prosecution for failure to call material witnesses to give evidence and without assigning reasons for such failure.*

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."*

On the 1st ground of appeal, the learned counsel submitted that the learned trial Judge did not adequately sum up the case to the assessors. He argued that, from the summing up notes, the assessors were; **first** not informed of their role and responsibilities in the trial and **secondly,** that the learned trial Judge did not only fail to sum up the evidence to

them but failed also to direct them on vital points of law. It was Mr. Mongo's submission thus that the omission renders the trial a nullity. In support of his argument, he cited the case of **Kinyota Kabwe v. Republic,** Criminal Appeal No. 198 of 2017 (unreported).

In reply to the submission made by the appellant's counsel in support of the 1st ground of appeal, Ms. Mpagama disputed the contention that the learned trial Judge did not adequately sum up the case to the assessors. She argued that, the learned Judge performed that duty as reflected by the fact that, the assessors fully participated in the trial. Relying on the case of **Jackline Exsavery v. Republic,** Criminal Appeal No. 485 of 2019 (unreported), the learned State Attorney submitted that, since from the record, the assessors understood the nature of the case, it is evident that in his summing up, the learned trial Judge summed up the evidence and directed them on vital points of law.

The second aspect of the complaint raised in the first ground of appeal, that the learned trial Judge did not sum up the evidence and direct the assessors on vital points of law will, if upheld, suffice to dispose of that ground. It is instructive to state that the learned trial Judge prepared his summing up notes in point form. In point No. 5 of the summing up notes, he indicated that the whole case depended on circumstantial

evidence and thus a vital point of law which the assessors were to be directed of its nature and the situations under which that type of evidence may be acted upon to found an accused person's conviction.

It is common ground however, as shown above that, the summing up notes are silent as regards the learned trial Judge's address to the assessors on that aspect. In her submission, Ms. Mpagama argued that, although the summing up notes are silent on the details of the address to the assessors by the learned trial Judge, the assessors understood the nature of the evidence and the points of law involved in the case. Relying on the case of **Jackline Exsavery** (supra), she submitted that the issue whether or not the assessors were directed on vital points of law can be gleaned from the manner in which they participated in the trial.

With respect to the learned State Attorney, although we agree with that approach, in the present case, it is doubtful whether the assessors did understand the nature of circumstantial evidence. This is because, from their opinion, they only relied on the evidence of the witnesses and the appellant's cautioned statement to opine that the appellant was guilty. They did not touch on the circumstantial evidence on which the learned trial Judge stated that the case was anchored.

Notwithstanding that finding, the case of **Jackline Exsavery** is distinguishable. As can be gathered from page 14 of that decision, unlike in the case at hand, in his summing up notes covering a total of seven pages, the learned Judge summed up the evidence and proceeded also to expound the ingredients of the offence in relation to the evidence. In this case, as stated above, no details of the summing up are contained in the learned trial Judge's notes. In a case in which a trial is held with the aid of assessor, the court is duty bound to sum up adequately to the assessors on all vital points of law – see for instance, the case of **Masolwa Samwel v. Republic,** Criminal Appeal No. 206 of 2014 (unreported). In that case, the Court stated as follows:

> *"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 ....."*

In a number of the decisions of this Court, the omission has been held to vitiate the proceedings - see for instance, the cases of **Tulibuzya Bituro v. Republic** [1982] T.L.R 265, **Said Mshangama @ Senga v. Republic,** Criminal Appeal No. 8 of 2014, **Rashid Ally v. Republic,** Criminal Appeal No. 279 of 2010 (both unreported) and **Charles Samson**

v. Republic [1990] T.L.R 39. Since in this case, it is not apparent from the summing up notes that the learned trial Judge summed up the evidence to the assessors and directed them on vital points of law involved in the case, we are constrained to nullify the proceedings. We thus accordingly hereby nullify them, quash the judgment and conviction and set aside the sentence.

The next issue for our consideration is whether or not we should order a retrial. To answer the issue, we shall be guided by the principle stated in the famous case of **Fatehali Manji v. Republic** [1966] 1 EA 343. The principle is stated in that case in the following words:

> *"In general a retrial will be ordered when the original trial was illegal or defective, it will not be ordered where the conviction is set aside because of insufficiency of evidence or for purpose of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should he ordered; each case must depend on its own facts and circumstances and an order for retrial should only be made where the interests of justice require it . . . ."*

Mr. Mongo urged us not to order a retrial contending that the evidence relied upon by the prosecution is insufficient. He relied on the contents of his 2nd, 3rd and 4th grounds of appeal. The gravamen of his argument is that the evidence of the appellant's cautioned statement was wrongly acted upon by the trial court to convict him. On her part, Ms. Mpagana argued that the evidence on record is sufficient to enable the prosecution to secure conviction if a retrial is ordered.

Having gone through the available evidence on record, we hasten to state that, it will not be in the interest of justice to order a retrial. The only evidence which was acted upon by the trial court to convict the appellant is exhibit P3. When that document was sought to be tendered as an exhibit, the appellant's counsel objected to it on, among other grounds, that the same is shown to have been recorded by him in the presence of one Upendo Mligo. The appellant denied that he recorded that statement. He also denied the contention by the prosecution that he volunteered to record it in the presence of the said Upendo Mligo. Furthermore, in his defence, the appellant maintained his retraction of that statement insisting that he merely signed an already prepared document on exertion.

That being the nature of the crucial evidence on record which the prosecution is expected to rely upon if a retrial is ordered, we are of the considered view that, given the particular facts of this case, a retrial based on that evidence alone will not be appropriate. We thus decline to make that order. In the circumstances, we order that the appellant be released from prison forthwith unless he is otherwise lawfully held.

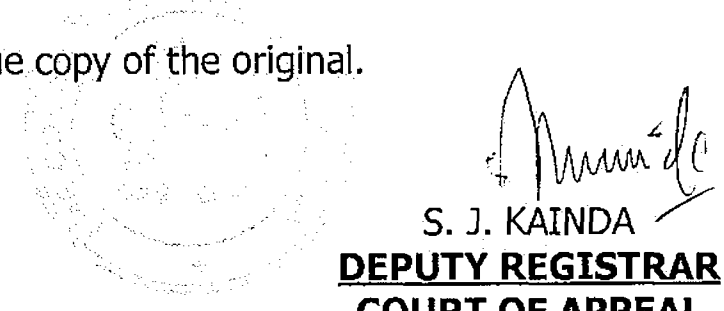
DATED at **IRINGA** this 27th day of September, 2021.

A. G. MWARIJA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The Judgment delivered this 28th day of September, 2021 in the presence of Mr. Jally Mongo, counsel for the Appellant and Mr. Alex Mwita, learned Senior State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.



S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL