IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: MKUYE, J.A., KOROSSO, J.A. And KIHWELO J.A.)

CRIMINAL APPEAL NO. 289 OF 2017

BONIFACE MARCEL TARIRO @ SIJALI..... APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

(Appeal from judgment of the High Court of Tanzania at Moshi)

(Fikirini, J.)

dated the 14th day of June, 2017
in
Criminal Session No. 2 of 2015

.....

JUDGMENT OF THE COURT

21st & 30th September, 2021

MKUYE, J.A.:

Before the High Court of Tanzania at Moshi, the appellant Boniface Marcel Tariro @ Sijali together with Justine Elisante Sam (former 2nd accused who was acquitted) were charged with the offence of murder contrary to section 196 of the Penal Code, Cap 16 R.E 2002. It was alleged in the particulars of offence that on 2/10/2013, the appellant and the former 2nd accused, at Makiidi Village within Rombo District in Kilimanjaro Region murdered, one, Aurelia Inyasi Kawishe (deceased). When the charge was read over to them, they each pleaded not guilty where upon the prosecution marshalled seven prosecution witnesses

and also seven exhibits were tendered before the trial court. In defence, only the appellant and the former 2nd accused testified.

For better appreciation of the appeal, we deem it appropriate to give its background albeit briefly as follows:

The appellant and the deceased's family were acquaintances as the appellant's mother used to work with the family of the deceased. Later on, in 2013 the appellant got employed by the deceased in her second-hand clothes business at Memorial market within Moshi Municipality. As he was well known to the deceased's family, he could occasionally go and even spent nights at the deceased mothers' home where the deceased also resided.

On 30/9/2013, Antonetta Inyasi Kavishe (PW2) who was the deceased's mother went to attend a funeral in Moshi Town, leaving behind the deceased and the appellant. She came back home on 3/10/2013. On arrival at her home from the funeral she found the house locked while the lights were on.

She tried to call the deceased through her mobile phone but could not reach her. This prompted her to inform her neighbors who arrived at

the scene. They also informed the police about the incident, who gave them a go ahead that the house be broken into.

They broke the door and after getting into the house, they found the deceased lying dead on the floor with several stab wounds and a big cut wound on her neck. Later on, PW2 noted that several items including a deck, electric iron, remote and stabilizer were missing.

This culminated into suspecting the appellant to have a hand in the murder and was arrested at the funeral of the deceased. At the police station the appellant allegedly confessed to have committed the offence which was followed by the recording of his cautioned statement in which he revealed that the former 2nd accused was also involved and that he had hidden the stolen items at the residence of Flora Ambrose Assenga (PW3).

The appellant allegedly led the police to PW3 where several items belonging to the deceased's mother were recovered hidden in the sulphate bag including the knife allegedly used in the commission of the crime. The appellant and the former 2nd accused were then arraigned for murder and upon the conclusion of the trial, the appellant was found guilty and convicted of the offence as charged while the former 2nd

accused was acquitted for failure by the prosecution to prove the case against him beyond reasonable doubt.

Aggrieved, the appellant has appealed to this court fronting a substantive memorandum of appeal containing six grounds of appeal as well as a supplementary memorandum of appeal with eighteen grounds of appeal. However, for reasons to become apparent shortly, we do not intend to reproduce them except for ground no. 7 of the supplementary memorandum of appeal to the effect that:

> *"The learned trial judge failed to direct the assessors on the vital elements of law in the summing up".*

When the appeal was called on for hearing, the appellant was represented by Mr. Edmund Ngemela learned advocate; whereas the respondent Republic had the services of Ms. Lucy Kyusa and Sabitina Mcharo, both learned State Attorneys.

Submitting in support of the said ground of appeal, Mr.Ngemela contended that **one,** the trial judge did not summarize the witnesses' evidence in the summing up to assessors; **two**, the salient features of law were not explained to the assessors; and **three**, the trial judge

failed to select the assessors in accordance with the law. He argued that failure to do so renders the proceedings a nullity.

Mr.Ngemela went on submitting that, one of the assessors, Laizer Mollel, at one stage did not participate in the trial because he was bereaved. However, he later resumed in the course of the trial and gave his opinion which was considered by the trial judge in the determination of the case. He said, this was a fatal irregularity which was not curable under section 388 of the Criminal Procedure Act, Cap 20 RE 2002 (the CPA). It was his submission that the irregularity vitiated the proceedings and prayed to the Court to nullify the proceedings and judgment, quash the conviction and set aside the sentence meted out against the appellant.

As to the way forward, Mr. Ngemela urged the Court to refrain from ordering a retrial as in his view the cautioned statement was problematic for having been taken out of time, the doctrine of recent possession was not proved; the sketch map was drawn by PW5 who recorded the appellant's cautioned statement before and therefore he had knowledge of what had happened; the Post-mortem Examination report (Exh. P1) and search warrant (Exh. P2) were not read over after

they were admitted in evidence; Edward Lenga Majebele (PW7) testified in court while he was not listed during committal proceedings and there was no notice to call additional witness under section 289(2) of the CPA.

In response, Ms. Kyusa conceded to the anomalies raised in relation to the assessors. She explained that the selection of assessors was problematic as the trial judge after introduction of the parties, listed them as part of the coram and that the record does not bear out that the assessors were selected. She added that even the appellant was not asked to comment or object to any of them. To show the procedure on how selection of assessors ought to be done she cited to us the case of **Abdallah Juma Bupale v. Republic,** Criminal Appeal No. 53 of 2017 (unreported) where the procedure and the manner upon which assessors are to be treated were explained. The learned State Attorney explained further that the trial judge did not explain to the assessors their roles.

The learned State Attorney further conceded that assessor Laizer Mollel at one stage was absent. She explained that the said assessor was not present when PW5 testified as he was bereaved. However, he resumed when PW7 testified. It was her argument that, that was not

proper. Worstly, Ms. Kyusa submitted that, Laizer Mollel gave his opinion including on PW5's testimony which he did not hear and the trial judge considered the opinions of all assessors in her judgment.

Apart from that, the learned State Attorney contended that the trial judge did not summarize the evidence of the witnesses in the summing up to assessors adding that she did not also explain to them the essential elements of law such as the salient features of the offence of murder, defence of *alibi,* doctrine of recent possession, circumstantial evidence and the principle of last person to be seen with the deceased. However, despite all those anomalies she was of the view that the appellant was not prejudiced.

With regard to the way forward, believing that the appellant was not prejudiced, she did not make any proposition as to the way forward though in her submission she seemed to contend that there was sufficient evidence to sustain the conviction.

We have anxiously considered the uncontested issue of irregularities on the assessors. We wish to take off by re-stating the obvious that, it is a requirement under section 265 of the CPA for the High Court in all criminal trials to sit with the aid of assessors who are to

be two or more. Their involvement in trials begins with their selection in terms of section 285 (1) of the CPA which states that:

> *(1) When a trial is to be held with the aid of the assessors, the assessors shall be selected by the court."*

The case of **Hilda Innocent v. Republic,** Criminal Appeal No. 191 of 2017 (unreported) is instructive on this aspect when the Court stated among others:

> *"...involvement of the assessors as per section 285 (1) of the CPA, begins with their selection. The trial judge therefore must indicate in the record that the assessors were selected followed by asking the accused person if he objects to the participation of any of the assessors before commencement of a trial. This must usually be followed by the usual practice that the trial judge must inform and explain to the assessors the role and responsibility during the trial up to the end where they are required to give their opinions after summing up by the trial judge."*

Also, in the case of **Abdallah Juma @ Bupale** (supra) the Court isted all steps relating to the assessors as follows:

1) *The Court* ***must select assessors*** *and* ***give an accused person an opportunity to object to any of them.***

2) *The Court has to number the assessors/ that is/ to indicate who is number one, number two and number three/ as the case may be.*

3) ***The Court must carefully explain to the assessors the role they have to play in the trial and what the judge expects from them at the conclusion of the evidence.***

4) *The Court to avail the assessors with adequate opportunity to put questions to the witnesses and to record clearly the answers given to each one. If an assessor does not question any witness, that too, has to be clearly indicated as: Assessor 2: Nil or no question.*

5) ***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 the assessors any possible defences and explain to them the law regarding those defences.*

6) *The Court to require the individual opinion of each assessor and to record the same."* [Emphasis added]

In the case at hand, our scrutiny of the record of appeal has revealed that the provisions of section 285 of the CPA were not complied with. For easy of reference, we have found it prudent to reproduce a portion of the proceedings dated 10/5/2017 as follows:

> *"**Date:** 10/5/2017*
> ***Coram:** Hon. P.S. Fikirini – Judge*
> ***For Republic:** Mr. Omary Kibwana, Senior State Attorney assisted by Ms. Nitike Emmanuel – State Attorney*
> ***For 1st Accused:** Ms. Ester Kibanga*
> ***For 2nd Accused:** Mr. Mussa Mziray*
> ***1st Accused** – present*
> ***2nd Accused** - present*
> ***ASSESSORS***
> 1. *Lazier Mollel*
> 2. *Netbruga Tarimo*
> 3. *Mursal Shirima*
>
> ***CC:** Rehema*
> *Information of murder contrary section 196 of the Penal Code is read over and explained to the accused persons in a language that they*

understand (Kiswahili) and they are required to plead thereto:

***1st accused**: "Si kweli".*

***2nd accused:** "Si kweli"*

***Court:** A plea of Not Guilty Entered*

Sgd: P.S. Fikirini

Judge

***Mr. Kibwana**: We have four (4) witnesses in attendance and we are ready.*

***Ms. Kibanga:** I am ready.*

***Mr. Mziray:** I am ready.*

***Mr. Kibwana**: We have no any objection to the assessors.*

***Ms. Kibanga**: The defence has no objection.*

***Ms. Mziray:** We have no objection.*

***Court:** The case to proceed as scheduled.*

Sgd P.S. Fikirini
Judge
10/5/2017

PROSECUTION CASE OPENS

***PW1:** Dr. Agripina Donasian Masao, Female, 44 years Chagga, SDA, Tanzanian, sworn and states:*

Xd BY Ms. Emmanuel ...."

Our scrutiny of the above excerpt has revealed that, **one,** there was no selection of assessors as per the law as they were merely listed as part of the coram that is why even the name of the court clerk, one, "Rehema" is appearing after the assessors have been listed. Immediately thereafter the information was read over to the accused persons and each entered his plea. **Two,** the accused persons were not given an opportunity to raise objection to any of the assessors who were purported to be selected by the trial court to sit with it.

Surprisingly, at page 36 of the record of appeal it is shown that after the information was read over to the accused persons and entered their plea, Mr. Kibwana who was a Senior State Attorney intimated to the trial court that they had four witnesses who were in attendance and that they were ready for hearing. That was followed by the response by the two advocates for the accused that they were also ready for hearing. Thereafter the State Attorney stated "*we have no any objection to the assessors.*" It is not clear as to whom he was responding as the record is silent on that. Then both defence counsel replied to have no objection on the assessors. We are just left to speculate if they were responding to a question posed by the court or not whether there was any objection to the assessors. Even if we assume, for the sake of argument that

there was such a question it is not clear as to whom it was addressed because we are not aware of any law requiring either the prosecutor or defence counsel to comment or object to the selected assessors.

However, be it as it may, since the accused persons were not asked and did not respond to that, we are settled in our mind that the accused were not asked if they had any objection to the assessors thus, we agree that they were denied such right. Apart from that, we agree with both counsel that the assessors were not told of their roles in the trial as the record of appeal is silent on that.

Besides that, the other anomaly is failure by the trial judge to summarize the evidence in the summing up notes. As was rightly stated by both counsel, the trial judge did not provide the assessors with summation of the prosecution and defence evidence. She also failed to explain the vital points of law involved in the case. This was a clear contravention of the provisions of section 298 (1) of the CPA which provides for a trial judge after the closure of the case for both the prosecution and the defence to sum up the evidence before requiring them to give their opinions orally as to the case generally and as to any

specific question of fact addressed to them by the judge and to record such opinions.

Though the issue of explaining the vital points of law may not come out clearly, this Court has in numerous cases interpreted that it is now a settled practice which the trial court must comply with. In order for the assessors to be able to give a correct opinion it has been emphasized that the summing up should include essential elements of law involved in the case. For instance, in the case of **Aluha Ally @ Asha v. Republic,** Criminal Appeal No. 501 of 2017 (unreported) the Court while citing the case of **Michael Maige v. Republic**, Criminal Appeal No. 153 of 2017 (unreported) the Court said as follows:

> *"... the issue of summing up to assessors is a requirement of law that for the trial judge who sits with the aid of assessors has to sum up to them before inviting their opinion as the main purpose is to enable them to give a correct opinion and the same can be of great value to the trial judge only if they understand the facts of the case in relation to the law. (See* ***Washington s/o Odindo v. Republic*** *1954 21 EACA;* ***Augustino Lodami v. R.*** *Criminal Appeal No. 70 of 2010;* ***Charles Lyatii @ Sadala v. R.,***

Criminal Appeal No. 290 of 2011 and ***Selina Yambi and 2 Others v. R.*** *Criminal Appeal No. 94 of 2013 (all unreported)."*

In this case, the trial judge summed up the case to the assessors as shown from page 177 to 181 of the record of appeal. However, looking at the summing up notes, apart from giving direction on some legal points such as burden of proof and standard of proof there is nowhere that the evidence from both the prosecution or the defence was summarized. As was correctly submitted by the learned State Attorney the evidence was not summarised which was in contravention of section 298 (1) requiring the trial judge to summarize the evidence from both the prosecution and defence.

Moreover, in this case the appellant was charged with an offence of murder to which he was convicted. However, as was rightly submitted by the learned State Attorney, the trial judge did not explain the salient elements of the offence of murder and how they can be proved. Again, although the trial judge seemed to base the appellant's conviction on the doctrine of recent possession and circumstantial evidence the same were not explained to the assessors and how they can be invoked to mount a conviction.

Besides that, the appellant had in his defence raised the defence of *alibi* and the trial judge discussed it at pages 233 and 234 when she accorded no weight as it was brought contrary to section 194 of the CPA but she did not explain it to the assessors during summing up.

There is no doubt that the totality of the omissions explained above amount to an inadequate summing up to assessors which render the trial a nullity - (See **Omary Khalifa v. Republic,** Criminal Appeal No. 107 of 2015 (unreported)). This stance was also taken in the case of **Said Mshangama @ Sanga v. Republic,** Criminal Appeal No. 8 of 2014 (unreported) where it was stated that:

> *"Where there is inadequate summing, non-directions or misdirection on such vital points of law to assessors, it is deemed to be a trial without the aid of the assessors and renders the trial a nullity."*

As regards the issue that assessor Laizer Mollel who was absent when PW5 was testifying and resumed when PW7 began to testify, we think, section 287 is instructive. The said section stipulates as follows:

"Where the trial is adjourned, the assessors shall be required to attend at the adjourned sitting and at any subsequent sitting until the conclusion of the trial."

Our reading of the above cited provision is that it mandatorily requires the assessors to be present throughout the trial until its conclusion. This stance was emphasized in the **Republic v. Assa Singh** (1937) EACA 41, where the Court of Appeal of East Africa was confronted by an akin scenario and it stated as hereunder:

"The question then is whether, if in a trial held by a judge with the aid of two assessors, one of the assessors is absent for a considerable portion of the time during which the most important part of the trial, viz. the examination of witnesses, is proceeding the court ceases to be a court of competent jurisdiction. It seems to me that there can be no doubt that in such circumstances, the trial is rendered null and void, for ...section 295, Code of Criminal Procedure, lays down the rule that if a trial is adjourned, as this was, from day to day, the jury assessor shall attend at the adjourned sitting and at every subsequent sitting until the conclusion of the trial..."

The Court of Appeal for East Africa then went on to say that:

"... we would add, further, that it would seem immaterial whether the assessor was absent for only one day or more than one, or whether the witnesses heard in his absence were prosecution or defence witnesses. The principle is there as also is the law."

In the end the Court of Appeal for East Africa found the omission fatal and rendered the trial a nullity.

In this case, the record of appeal bears out at page 55 that on 11/5/2017 when the matter came up for continuation of hearing the trial court informed the parties on the absence of assessor Mr. Laizer Mollel for being bereaved and the Court ordered the case to proceed as scheduled. Then the matter proceeded with the hearing of the evidence of F. 1900 D/Cpl Lameck (PW5) whose evidence was very long until on 12/5/2017 as shown at page 81 of the record of appeal. On the same date the court also heard the evidence of Sesilia Ignas Kavishe (PW6) whose evidence is at page 81 to 86 of the record of appeal. Then Mr. Laizer Mollel resumed on 15/5/2017 when PW7 testified to the end of the trial. Surprisingly enough, Mr. Laizer Mollel gave his opinion (page 184 – 185 of the record of appeal) which also involved PW5 whose

evidence he did not hear. And, the trial court considered the assessors opinion when it said:

> *"Considering all the evidence presented to Court including exhibits, final submissions made and the assessors' opinions, I am convinced that ..."*

We think, based on the case of **Assa Singh** (supra) it was not proper for Mr. Laizer Mollel to resume and participate with hearing after having been absent for two days of hearing of the case. As such, resuming with hearing of the case and giving opinion on evidence of the witness he did not hear and the same being considered by the Court, was a fatal omission which renders the entire trial and the judgment thereof a nullity.

In the end, considering all omissions we have endeavoured to explain above, we are of the settled view that, they are fatal and render the trial a nullity. Consequently, we nullify the proceedings and the judgment thereof, quash the conviction and set aside the sentence meted out against the appellant.

As to the way forward, we have considered the rival arguments on it, while refraining to analyse the evidence, we find that in the circumstances of the case and in the interest of justice ordering a retrial

would be the best option. In the event, we make an order for an expedited retrial of the appellant before another judge with a new set of assessors. For avoidance of doubt we order that the appellant should remain in custody to await for a retrial.

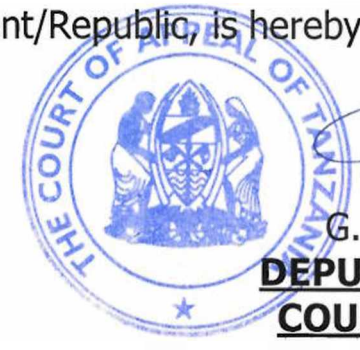
DATED at **ARUSHA** this 29th day of September, 2021.

R. K. MKUYE
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

This Judgment delivered on 30th day of September, 2021 in the presence of Mr. Edmund Ngemela, learned advocate for the appellant and Ms. Lusaje Samuel, learned State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.



G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL