IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

(CORAM: LILA, J.A., KOROSSO, J.A. And MWANDAMBO, J.A.)

CRIMINAL APPEAL NO. 146 OF 2018

LAZARO KATENDE.....APPELLANT

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

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

(Ngwala, J.)

dated the 12th day of April, 2017

in

Criminal Sessions Case No. 43 of 2015

.....

JUDGMENT OF THE COURT

19th & 26th February, 2021.

MWANDAMBO, J.A.:

Lazaro Katende, the appellant, stood trial before the High Court sitting at Mbeya in Criminal Sessions Case No. 43 of 2015 on an information of murder. According to the information to which the appellant pleaded not guilty, it was alleged that on 18th June, 2014, at Uhamila Village, Mbarali District, Mbeya Region, murdered one Suzana contrary to section 196 of the Penal Code [Cap. 16 R.E. 2002].

The case for the prosecution which the trial court found proved the offence rested on five witnesses and 2 exhibits. Briefly, the appellant and

the deceased were husband and wife in an association which was blessed with four issues one of whom being Daudi Lazaro Katende, a tender age witness who testified as PW2. Prior to the marriage with the appellant, the deceased was married to another man with whom she had several children including Edina Kahogo (PW1).

It was common ground that the deceased and her children stayed in the same compound though some stayed in different houses. PW2 stayed in the same house with the deceased whilst PW1 stayed in a different house. It is not in dispute that in addition to farming activities, the appellant also used to offer his casual labour to different people for a wage. Prior to 18th June, 2014, the appellant had disappeared from the matrimonial home. According to him, he had gone to do some labour work involving rice harvest somewhere in another village for eleven days. PW1's version was that the appellant had disappeared for about a month to a village called Isisi. Be it as it may, it is the appellant's suspicious and clandestine return home on the night of 18th June, 2014 which led to the event that culminated into the death of the deceased.

There was a different version of what actually transpired on the material night, for whereas PW1 had that the deceased had wakened her up during the night breaking the news of the appellant's clandestine move

to gain ingress in the matrimonial home, the appellant had a different story. His version was that upon his return at the compound, he felt sweating and so he needed to cool off under a mango tree in the compound, and when he wanted to enter the matrimonial house, the deceased refused him entry spreading her hands at the door of that house thereby preventing him from gaining ingress.

By reason of the deceased's refusal to allow him enter the house, the appellant is said to have retrieved a knife, which, according to the appellant was near the door and stabbed the deceased on her chest resulting into her falling down at the door. Apparently, the deceased had yelled to which PW1 responded only to find her mother falling down whilst the appellant was moving away. Later on, a report was made to the police through Alex Kaihule (PW3), the Hamlet Executive Officer. In response, a team of police officers which included No. E. 8265 DC Roman (PW4) arrived at the scene and took the body of the deceased to Rujewa Hospital for examination before releasing it to the family for burial.

Subsequently, the appellant was arraigned in the High Court on an information of murder and stood trial in which five prosecution witnesses testified and one for the defence through the appellant.

In her bid to comply with section 265 of the Criminal Procedure Act [Cap 20 R.E. 2002 now R.E 2019] (the CPA), the trial judge selected three assessors who sat with her. After the trial judge had made a summing up to them, the assessors returned a verdict of guilty to which she concurred. Being satisfied that the prosecution had proved its case on the required standard, the learned trial judge convicted the appellant as charged followed by the mandatory death sentence both of which are challenged in this appeal.

Initially, the appellant had lodged a memorandum of appeal containing six grounds of appeal. Before the commencement of the hearing, Mr. Baraka Mbwilo, learned advocate for the appellant sought and was granted leave to add an additional ground to the effect that the trial was a nullity on account of an inadequate summing up to the assessors.

During the hearing, we heard Mr. Baraka Mbwilo, learned advocate and Mr. Saraji Iboru, learned Senior State Attorney assisted by Ms. Prosista Paul, State Attorney on the point raised ahead of arguments on other grounds.

Mr. Mbwilo drew our attention to pages 41 and 42 containing the learned trial judge's summing up and pointed out that the notes were too

inadequate to constitute a proper summing up to the assessors as envisaged by section 298(1) of the CPA. Amplifying, the learned advocate argued that the summing up notes lacked directions on the essential ingredients of the offence of murder, vital points of law involved in the case and what was meant by malice aforethought which featured in the judgment.

The foregoing apart, Mr. Mbwilo pointed out yet another anomaly in the proceedings. He faulted the trial judge for failing to explain the role of the assessors after their selection to sit with her in the trial. Relying on the Court's decision in **Omari Khalfan v. R**, Criminal Appeal No. 107 of 2015 (unreported), the learned advocate invited the Court to declare the trial a nullity and make an order for a retrial.

For his part, Mr. Iboru readily conceded to the deficiencies in the trial judge's failure to explain the role of assessors and the wanting summing up. He likewise conceded to the prayer made by his learned friend inviting the Court to make an order for a retrial.

It is plain from the foregoing that the determination of this appeal turns not on the merits of it rather on the issue raised by the learned advocate for the appellant, that is to say; validity of the trial and the

eventual conviction and sentence on account of the wanting summing up to the assessors as well as the omission to explain their role.

We shall begin with the issue whether the trial court explained the role of the assessors after their selection. Before doing so, we think it is apposite to state at this stage that section 265 of the CPA requires that all criminal trials before the High Court to be with the aid of two or more assessors as the trial judge may think fit provided that the number does not exceed three. That means, any trial conducted in contravention of the law becomes a nullity so will the conviction and sentence arising from it.

It is also pertinent to state here that it is trite law that section 265 of the CPA does not merely mean the presence of assessors during the trial. It means far more than that, that is to say; their selection, their participation in the trial by putting questions to the witnesses for clarification and giving their opinions after the trial judge's summing up to them in pursuance of section 298(1) of the CPA. Trite law has it that violation of any of the above aspects is tantamount to the trial being conducted without the aid of assessors rendering it a nullity regardless of their physical presence throughout the trial. Our decisions in **Omari Khalfan v. R** (supra), **Khamis Rashid Shaaban v. D.P.P**, Criminal Appeal No. 284 of 2013 and **Silvery Adriano v. R**, Criminal Appeal No.

121 of 2015 (both unreported), are just a few amongst numerous decisions holding that a trial will be rendered a nullity by reason of irregularities in the selection and improper summing up to the assessors.

An examination of the record in this appeal at page 8 reveals that after the assessors were cleared and selected to sit with the trial judge. However, there is nothing on record indicating that their roles were explained to them before assuming their duties. Mr. Mbwilo argued that that was fatal and we respectfully agree with him. In our view, apart from the requirement of the law, logic and common-sense dictates that a meaningful participation of the assessor in a trial presupposes understanding and appreciation of their role. Indeed, it has been the established practice in the High Court for a trial judge to explain the roles of the lay assessors for them to perform their duties effectively; assisting the trial judge in determining the case on matters of fact. See for instance: **Apolinary Matheo & 2 Others v. R**, Criminal Appeal No. 436 of 2016(unreported) in which the Court cited its earlier decision in **Fadhili Yusufu Hamid v. The Director of Public Prosecutions**, Criminal Appeal No. 129 of 2016 (also unreported) which outlined the basic procedures to be complied with by trial judges in all criminal trials one of which being explanation of the role of the assessors. The Court did not

mince its words in **Apolinary Matheo's** case (supra). It held that failure to explain to the assessors of their duties makes the trial unfair warranting its nullification (at page 16). In the upshot, since the trial judge omitted to explain to the assessors of their role, that omission was fatal vitiating the trial.

Next, we shall deal with the complaint on the wanting summing up. The complaint is that the trial judge did not direct the assessors on all vital points of law relevant to the case. There is an unbroken wall of authorities stressing the importance of a proper summing up to the assessors and for our purpose, we shall refer to **Omari Khalfan v. R** (supra) cited to us by Mr. Mbwilo in which the Court reiterated its stance on the importance of summing up to the assessors underscored in the defunct Court of Appeal for Eastern Africa in **Washington s/o Odindo v. R** [954] 21 EACA 392 thus:

> *"The opinions of the assessors can be of great value and consistence to the trial judge but only if they fully understand the facts of the case before them in relation to the relevant law."*

In **John Mlay v. R**, Cr. Appeal No. 216 of 2007 (unreported) cited recently in **Respicius Patrick @ Mtanzangira v. R,** Criminal Appeal No. 40 of 2019 (also unreported), the Court underscored what should be contained in a proper summing up that is to say; all essential elements / ingredients in a case, burden of proof and the duty of the prosecution to prove its case beyond reasonable doubt, elaboration on the cause of death, malice aforethought and main issues in the case including, but not limited to the nature of the evidence, credibility of witnesses etc.

The trial judge's summing up notes in this appeal can be found at page 41 and 42 of the record of appeal and we shall let them speak for themselves as here under:

> ***"COURT: SUMMING UP OR SUMMARY FOR ASSESSORS.***
>
> ***PW4:*** *The Police Officer went to Ukwavila Village at the scene of the crime and found the body of the deceased with the injury on the chest. He with other Policeman collected the body and took it to Rujewa Hospital on 19/06/2014 where the postmortem Examination was conducted in the presence of PW3, PW4 arrested the accused person who was apprehended by the villagers on 04/07/2014 suspected to have committed the murder of Suzan Mbendwa on*

18/06/2014. PW4 arrested the accused and recorded some statements of the witnesses. PW5 the Justice of Peace recorded the extra judicial statement of the accused person (exhibit P4).

In defence the accused (DW1) has denied to have killed the deceased maliciously. He testified that the stabbed the deceased on the chest accidentally and that he had not intended to kill his wife.

That is all.

Court: *in brief this is the summary of the substance of the evidence that has been established in this case, that requires each one of you assessors to give his or her opinion with regard to the offence of murder facing the accused person.*

Sgd. A.F. Ngwala

Judge

28/03/2017"

We have no doubt that it will be clear by now that the complaint by Mr. Mbwilo shared by Mr. Iboru is, with respect, not without any justification. It is plain that what appears from the summing up notes is merely a summary of the evidence of some of the witnesses leaving behind PW3's evidence let alone the trial judge's conspicuous omission to direct the lay assessors on all vital points of law in the case. It can hardly

be said that there was any summing up on the basis of which the assessors could have meaningfully given their respective opinions with regard to the offence of murder facing the appellant. In **Said Mshangama @ Senga v. R,** Criminal Appeal No. 8 of 2014 (unreported), the Court stated:

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

Our examination of the judgment indicates that the learned trial judge spent some time discussing the existence of malice aforethought in the killing of the deceased which indeed was her basis of finding the appellant guilty as charged. However, she did not direct the lay assessors on what it meant by malice aforethought in relation to the trial. Without much ado, we uphold the arguments by Mr. Mbwilo supported by Mr. Iboru that the summing up notes were inadequate which resulted in depriving the assessors the opportunity to express their opinions meaningfully as required of them by s. 298(1) of the CPA. Consistent with our previous decisions in like cases including **Omari Khalifan v. R** (supra) cited to us by Mr. Mbwilo, the trial cannot be said to have been conducted with the aid of assessors as required by s. 265 of the CPA. The

ailments in the summing up were incurably fatal to the trial of the appellant rendering the proceedings a nullity.

In the upshot, we cannot but uphold the additional ground of appeal which is sufficient to dispose of the appeal. Consequently, the net effect is that we have to and hereby nullify all the proceedings of the trial from the stage of selection of the assessors to the end of the trial. Having nullified the proceedings, the judgment that followed convicting the appellant of murder of the deceased is quashed resulting into setting aside the sentence.

As to the way forward, Mr. Iboru was at one with the learned advocate for the appellant that the case is fit for a retrial to which we agree guided by the rule laid down by the defunct Court of Appeal for Eastern Africa in **Fatehali Manji v. R** [1966] E.A 343 which has been followed in many of our previous decisions, amongst others, **Mshangama @ Senga v. R** (supra). We need not say anything more than acceding to the joint prayer for an order for the retrial of the appellant.

That said, we order for the retrial of the appellant before another judge and a new set of assessors. Considering the time, the appellant has

been in custody, we direct that his retrial be expedited. In the meantime, the appellant shall remain in custody awaiting his retrial.

It so ordered.

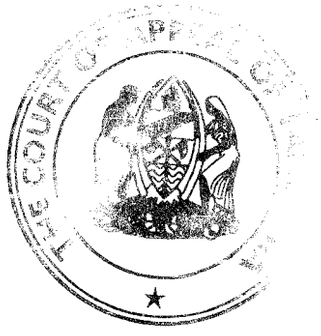
DATED at **MBEYA this** 25th day of February, 2021.

S. A. LILA
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

The Judgment delivered this 26th day of February, 2021 in the presence of Mr. Ngwale Stewart learned counsel appeared for the appellant and Ms. Prosista Paul, learned State Attorney appeared for the Respondent/Republic is hereby certified as a true copy of the original.



G.H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL