IN THE COURT OF APPEAL OF TANZANIA
AT MBEYA

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

CRIMINAL APPEAL N0. 71 OF 2018

MALAMBI S/O LUKWAJA .....APPELLANT

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania, at Sumbawanga sitting at Mpanda)

(Mambi, J.)

dated the 14th day of February, 2018
in
Criminal Sessions No. 11 of 2011

.....

JUDGMENT OF THE COURT

15th & 26th February, 2021

MWANDAMBO, J.A.:

In Criminal Sessions Case No. 11 of 2011, the High Court of Tanzania, Sumbawanga Registry sitting at Mpanda tried Malambi Lukwaja, the appellant on the information of murder contrary to section 196 of the Penal Code [Cap 16 R.E. 2002]. The appellant's trial was connected with the death of Ibrahim s/o Juma alleged to have been killed by the appellant on an unknown date at Igalula village, Mpanda District. Satisfied that the evidence adduced by the prosecution proved

the case on the required standard, the High Court (Mambi, J.) found the appellant guilty as charged. The appellant was accordingly convicted and sentenced to the mandatory death sentence. Aggrieved, he has preferred the instant appeal. He was represented by Mr. Victor Mkumbe, learned advocate who, in terms of rule 73 (2) of the Tanzania Court of Appeal Rules, 2009 (the Rules) lodged a supplementary memorandum of appeal replacing the appellant's own memorandum he had lodged earlier on.

The facts of the case may be stated briefly as follows. The deceased and the appellant were familiar to each other living at distant villages. It is common ground that the appellant was owed by the deceased in the sum of TZS 200,000.00 payable through an agreed number of bags of rice after the harvest season. Consistent with the agreement for the repayment of the debt, on 9th July, 2009, at 6.00 a.m. the deceased left his home by a bicycle to the appellant to collect the rice. He carried with him a number of empty polythene bags for stuffing the rice he expected to collect from the appellant.

According to Hamisa Hassan (PW1), the deceased's widow, the appellant carried a radio with him. PW1 was supported by the deceased's son; Juma Ibrahim (PW2) who described his late father's

radio as black (Rizing). Quite unexpectedly, the deceased did not return home for about a month which raised suspicion necessitating a family meeting to deliberate on the whereabouts of the deceased. Consequently, on 9th August, 2009 PW2 left to the appellant's home in the company of one Shaban; his brother in law. Upon arrival at the said home, PW2 and his brother in law found the appellant who, whilst admitting that the deceased left empty polythene bags with him, he never saw him back after he had left his home. According to PW2, he managed to identify the empty polythene bags his deceased father took on 9th July, 2009 together with the radio at the appellant's home. Thereafter, PW2 and his company left the appellant's home. On their way back, they met one Bwana Foma; a friend of the deceased who advised them to report the incidence to a police station because, according to the advice received, Malambi (the appellant) was not a good person because of the information that one person who visited his home never returned until that day.

According to Ramadhani Juma (PW3), the deceased's elder brother, a report on the missing of his younger brother was made to the police on 14th August, 2009 and upon asking the appellant's wife, she confirmed to them that the deceased and her husband left on an

unknown date and spent a night at the appellant's shamba but the deceased never returned. Likewise, PW3 managed to identify what he claimed to be the deceased's bicycle and sandals commonly known as 'Yeboyebo' at the appellant's home.

PW4's evidence was more or less identical to that adduced by PW3 except for the fact that PW4 claimed to have seen a panga full of blood at the place where the slaughtered body of the deceased was buried. Similarly, PW4 added to the list of objects he saw including a club and a bag stained with blood.

Subsequently, acting on the report made by the deceased's family, the Police arrested the appellant in connection with the missing of the deceased. On the strength of the information received from the appellant's wife, a dead body was discovered buried in the deceased's shamba. That body was exhumed and later, an autopsy conducted by Dr. Bernard Masanja (PW6) in the presence of the police revealed that the cause of the deceased's death was internal bleeding and hemorrhagic shock as a result of a deep cut wound through the trachea.

On the foregoing factual background, the appellant was charged for the murder of the deceased to which he pleaded not guilty. Initially, the appellant stood trial before Sambo, J who convicted him as charged

earning a death sentence in a judgment dated 13th March 2014. On appeal in Criminal Appeal No. 70 of 2015, this Court nullified the entire proceedings, quashed conviction and set aside the sentence upon being satisfied that the trial was irregular by reason of the trial judge denying the assessors who sat with him as dictated by section 265 of the Criminal Procedure Act [Cap. 20 R.E. 2002- now R.E. 2019] full participation in the proceedings. The Court ordered a retrial before another judge with a new set of assessors.

In compliance with the Court's order, the appellant stood a second trial before Mambi, J. who, after hearing evidence from both the prosecution and the defence, like his predecessor found the appellant guilty as charged. The learned trial judge convicted the appellant followed by the mandatory death sentence both of which are challenged in the instant appeal.

In the supplementary memorandum, Mr. Mkumbe sought to fault the decision of the High Court on three areas of complaint that is to say; reliance on illegally obtained cautioned and extra judicial statements (exh. P3 and P4), wrongful reliance on the doctrine of recent possession and founding conviction on the doubtful evidence of the discovery of the deceased's body at the appellant's shamba.

At the hearing of the appeal, Mr. Mkumbe appeared representing the appellant who was connected through the Court's video Link facility from Lindi prison. The respondent was represented by Messrs. Fadhili Mwandoloma learned Senior State Attorney and Ms. Marieta Maguta, learned State Attorney resisting the appeal.

The learned advocate for the appellant opted to stand by his written arguments in support of the grounds of appeal he had filed ahead of the date of hearing which he believed to be sufficient to sustain the appeal. Before we allowed him to rest, we wanted to hear from him whether the trial was conducted with the aid of assessors as required by section 265 of the Criminal Procedure Act [Cap. 20 R.E 2019] (the CPA).

Responding, Mr. Mkumbe pointed out several irregularities in the conduct of the trial. **Firstly,** he contended that the record does not show if there was any selection of the assessors and if so, whether the appellant was afforded an opportunity to express his opinion on any of the persons proposed to sit with the trial judge as assessors. **Secondly,** the learned advocate criticised the summing up notes appearing from page 72 to 89 of the record of appeal arguing that they were inadequate

for failure to direct the assessors on vital points of law relevant to the case to enable them give their opinions to the trial judge.

Under the circumstances, the learned advocate charged that the anomalies identified were fatal vitiating the trial with the net effect that it was not conducted with the aid of assessors as mandated by section 265 of the CPA. Going forward, whilst conceding to the principle laid down in **Fatehali Manji v. Republic** [1966] E.A. 343 for ordering a retrial, the learned advocate urged us to refrain from taking that route. This is so, the learned advocate argued, ordering a retrial had the effect of subjecting the appellant to trial for the third time for no fault of his which was tantamount to an unfair trial given the time he has so far spent in custody.

At any rate, the learned advocate impressed upon us that a retrial will serve no useful purpose because the evidence on record is too wanting to sustain the charge. He specifically attacked the cautioned and extra judicial statements relied upon by the trial court for being taken beyond the basic period contrary to section 50 and 51 of the CPA.

Mr. Mwandoloma readily conceded to the irregularities in the selection of assessors as well as the wanting summing up notes both of

which resulted into an unfair trial warranting its nullification, quashing conviction and setting aside the sentence. Not surprisingly, unlike the appellant's advocate, Mr. Mwandoloma invited the Court to order a retrial considering the existence of sufficient evidence to sustain the charge regardless of the fact that the appellant will be standing trial for the third time. Whilst conceding that some of the witnesses the prosecution is expected to call were not listed as such during committal proceedings, the learned Senior State Attorney maintained that the remaining witnesses together with the extra judicial statement will be sufficient to sustain the charge considering the gravity of the offence and the corresponding capital sentence.

When he was given opportunity to re-join, Mr. Mkumbe was adamant that the evidence available is too insufficient to warrant an order for a retrial. He reiterated his prayer for an order releasing the appellant upon the Court quashing conviction and sentence.

Having heard arguments from the learned counsel, it is hardly controvertible that the irregularities pointed out by the learned advocate for the appellant and conceded by the learned Senior State Attorney are

grave enough to vitiate the trial. The only point of divergence is whether this is a fit case for ordering a retrial.

For a start, section 265 of the CPA stipulates that:

> *"All trials before the High Court must be with the aid of assessors the number of whom shall be two or more as the Court thinks fit"*

Although the above section does not prescribe the manner in which assessors may be selected, this Court gave an elaborate procedure to be complied with by trial judges for the selection of the assessors in **Laurent Salu & 5 Others**, Criminal Appeal No. 176 of 1993 (unreported). **One**; selection assessors of must be preceded by giving an accused person an opportunity to object to any of them. **Two**; the trial judge has to number the assessors with a view to indicating who is number one, number two and number three as the case may be and, **three**; there must be a careful explanation to the assessors of the role they have to play in the trial and what the judge expects from them at the conclusion of the evidence.

We have reiterated that position in various cases including; **Apolinary Matheo & 2 Others v. R.**, Criminal Appeal No. 436 of 2016 (unreported) in which a trial was held to be a nullity by reason of the

High Court failing to comply with the procedure in the selection of assessors, failure to give the accused opportunity to express his objection against any of the assessors as well as inadequate summing up.

The record of proceedings in the instant appeal reveals that following the order for the retrial, the appellant appeared before Mambi, J. on 12th February, 2018 for the first time initially for a preliminary hearing and later on the same day the trial commenced. We shall let the record speak for itself on what transpired after conducting the preliminary hearing reflecting the following:

> *"**Court**: The matter is adjourned for half an hour*
>
> *Sgd: Dr. A. J. Mambi*
>
> *Judge*
>
> *12.02.2018*
>
> ***Court**: The Court resumes at 15.45 p.m.*
>
> *Assessors are invited.*
>
> *1. Maria C. Kapani*
>
> *2. Thobias Kazi Mzuri*
>
> *3. Mathias Kalyagi*
>
> ***Prosecution**: My Lord we have five witnesses for today and we are ready.*
>
> *Sgd: Dr. A. J. Mambi*
>
> *Judge*

12.02.2018

***Court**: The first witness is called .." [at PP 23 – 24]*

It is not clear to us how the names appearing at page 24 of the record sneaked into the record of proceedings in the absence of any explanation to that effect. Besides, in terms of section 266 (1) of the CPA, persons qualified to serve as assessors must be between 21 to 60 years of age. There is no indication of the age against the names listed as assessors.

On the other hand, besides listing the names as assessors, there is no indication that the appellant was given opportunity to object to any of them. As rightly submitted by both learned counsel, that was a fatal irregularity rendering the trial a nullity. We agree with them on the authorities we have laid our hands on particularly; **Alexander Stima v. R,** Criminal Appeal No. 398 of 2017 and **Chacha Matiko @Magege v. R,** Criminal Appeal No. 562 of 2015 (both unreported).

Worse still, there is no indication in the record showing that the roles of the assessors were explained to them. In **Ferdinand s/o Kamande & 6 Others v. The DPP**, Criminal Appeal No. 390 of 2017 (unreported), the Court relied on its earlier decision in **Hilda Innocent**

v. R., Criminal Appeal No. 181 of 2017 (also unreported) in which it stressed, *inter alia*:

> *"It is instructive to note that involvement of the assessors as per section 285 (1) of the CPA begins in 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 the 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 after summing up by the trial judge".*

Lastly in the list of irregularities relates to the summing up to the accessors assuming the ailments discussed above did not exist. This takes us to section 298(1) of the CPA which stipulates:

> *298.-(1) 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.*

It has been held that despite the use of the word may in sub-section 1, the provision is imperative meaning that the trial judge must sum up to the assessors for them to perform their statutory duty of giving their opinion as required of them under s. 298(1) of the CPA. See: **Mulokozi Anatory v. R**, Criminal Appeal No. 124 of 2014 cited in **Omari Khalfan v. R**, Criminal Appeal No. 107 of 2015 (both unreported). Corollary to the foregoing, meaningful assessors' opinions are a result of a proper summing up being made by the trial judge. On this we are alive to the wisdom expressed by the Court of Appeal for Eastern Africa in **Washington s/o Odindo v. R**. (1954) 21 EACA 392 which stated:

> *"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**, Criminal Appeal No. 216 of 2007 (unreported) for instance, the Court underscored the purpose of summing up being to enable the assessors to arrive at correct opinions. As to what constitutes a proper summing up, whilst acknowledging that summing up is a matter of personal style, it stressed that a proper summing up, detailed

or otherwise, must contain all essential elements in a case, that is; all ingredients of the offence, 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 such as credibility of witnesses. see also: **Respicius Patrick@ Mtanzangira v.** R, Criminal Appeal No. 70 of 2019(unreported).

An examination of the trial judge's summing up notes appearing at pages 72 – 88 of the record of appeal would reveal the following, **One,** a host of the facts appearing at page 72 – 74 of the record contain matters which are not reflected in the evidence for the prosecution. Those facts include what the appellant's wife (who was not called as a witness) is claimed to have told PW1 and his cousin that the radio the appellant was found with was given to him by the deceased who had gone to oversee his milling machine business elsewhere. **Secondly**, before embarking on the summary of the evidence, the trial judge outlined what he termed to be some of the basic criminal law legal principles (at P. 75), standard of proof in criminal cases, ingredients of murder and, in the absence of direct evidence, that a fact may be proved by an unbroken chain of circumstancial evidence. What followed was the narration of evidence for both the prosecution and the defence

and closing submissions by the defence and the prosecution. Thereafter, the record depicts the following:

> *"Hon. Assessors: It is not possible for me to restate every aspects of evidence I believe, however, that will take a longtime. My belief is that what was stated by both prosecution and defence is still fresh in your memories such that you are at liberty to state any facts which you feel to be material and which I may not have touched. The few issues:*
>
> *1) Whether the prosecution has proved the charge against the accused beyond reasonable doubt or not.*
>
> *2) Whether the accused committed the offence which he stands charged with. You are at liberty to raise more issues you wish to address.*
>
> *You are at liberty provided at the end of your submission you should state whether or not the accused person is guilty. You are now invited to give your considered humble opinions.*
>
> *Sgd: Dr. A. J. Mambi*
>
> *Judge*
>
> *19/02/2018"*

We may pause here and make a few remarks in relation to the quoted concluding part of the summing up notes. **One**, apart from the summary of the evidence followed by submissions from counsel, there is

no indication that the trial judge guided the assessors on any of the criminal law principles he had outlined earlier. **Secondly**, there is no indication whatsoever guiding the assessors on the circumstancial evidence and what the assessors were expected to do in relation thereto. **Thirdly**, whereas it was the duty of the trial judge to sum up to the assessors at the end of the trial, he appears to have left the assessors to give their opinions beyond his own summing up notes. We feel constrained to say at this stage that giving the assessors the impression that they were at liberty to wander and resort to their fresh memories by raising issues on which they had not been directed was, with respect an abdication of duty. It was contrary to the dictates of the law which enjoins the trial judge to sum up to the assessors to enable them perform their duty of giving their opinions as required of them under section 298 (1) of the CPA.

To clinch it all, a look at the judgment shows that the learned judge found the appellant guilty on several types of evidence that is to say; circumstancial evidence, cautioned and extra judicial statements (exhibits P3 and P4) and on the doctrine of recent possession. Apart from a casual reference to circumstancial evidence in the summing up notes, the trial judge did not direct the lay assessors on the cautioned

and extra judicial statements on which he relied in finding the appellant guilty as charged. Neither did he do so in relation to the invocation of the doctrine of recent possession on which he spent a great deal in his judgment from pages 121 to 126 of the record of appeal. No where in the summing up notes did the trial judge direct the lay assessors circumstances in which a trial court can invoke the doctrine of recent possession to convict an accused person and whether those circumstances obtained in the case they were called upon to express their opinions. That was irregular. It amounted to the judge excluding the assessors in the full participation in the trial. On the authority of our decision in **Ferdinand S/o Kamande & 5 Others v. R.** (supra) cited to us by the learned Senior State Attorney and many others we have laid our hands on, the trial was rendered a nullity by reason of the wanting summing up to the assessors. Such a trial is as good as no assessors had participated therein in contravention of section 265 of the CPA.

Consequently, we would accept the invitation made by both learned counsel to exercise our revisional power vested on us by section 4 (2) of the AJA by nullifying the entire proceedings immediately after the stage of the preliminary hearing to the end of the trial as we hereby do. Having nullified the trial proceedings, there will no longer be any valid

judgment and so the same is quashed together with the conviction. The sentence meted out to the appellant is set aside.

The next question for our determination relates to the way forward. Whilst Mr. Mkumbe would have the court refrain from ordering a retrial, Mr. Mwandoloma quite unsurprisingly, had a different view. He invited us to order a retrial because, according to him, there is sufficient evidence to sustain the information of murder during the second retrial.

First of all, we are alive to the principle in cases such as this where a trial leading into the impugned judgment is held to be a nullity. The oft quoted case of **Fatehali Manji v. R.** (supra) and many of our previous decisions that followed **Manji's** case are apt on the issue. In **Fatehali Manji's case** (supra) the defunct Court of Appeal for Eastern Africa stated:

> *"In general, a retrial will be ordered only 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 the purpose of enabling the prosecution to fill gaps in its evidence at the first trial... 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."*

We have consistently followed and applied the rule in that case in many of our decisions including; **Said Mshangama@ Senga v. R.,** Criminal Appeal No. 8 of 2014 (unreported), where the Court held that inadequate summing up, non- direction or misdirection on vital points of law to assessors is tantamount to a trial without the aid of assessors rendering the trial a nullity. See also: **Halfan Ismail@ Mtepela v. R,** Criminal Appeal No. 38 of 2019 and **Khamis Rashid Shaaban v. D.P.P**, Criminal Appeal No. 284 of 2013 (both unreported).

Guided by the foregoing, it is plain from the record that the case for the prosecution rested on circumstancial evidence as well as the cautioned and extra judicial statements. It is also plain that some of the witnesses the prosecution paraded during the nullified trial were not listed during the committal proceedings particularly; Juma Ibrahim (PW2) and Inspector Atanas Mwakyusa (PW5). The record shows that it is PW2 who was said to have been sent to trace the deceased accompanied by his cousin on 9th August, 2009. Similarly, it is PW5 who tendered in evidence the appellant's cautioned statement (exh. P3) relied upon in convicting the appellant, amongst others. In our view, since the two witnesses were not listed during the committal proceedings, they cannot be used by the prosecution as witnesses in the

retrial if one were to be ordered. They cannot tender any document without being included in the list of witnesses. Doing so will amount to enabling the prosecution make good what it failed to do during the nullified trial to save its day in court which will not be in the interest of justice thereby militating against the principle guiding courts whether or not an order for retrial should be made.

Mr. Mwandoloma admitted as such but was adamant that the remaining witnesses plus the extra judicial statement will remain intact to sustain the case against the appellant. That may be so but yet again, upon a careful examination of the entire record and particularly the part containing committal proceedings running from page 163 through page 183, we have not been able to lay our hands anywhere indicating that the prosecution intended to rely on the extra judicial statement as one of its exhibits during the trial. It is not listed anywhere as clearly indicated at page 183 of the record. It follows thus that the extra judicial statement was not part of the substance of the evidence the prosecution intended to tender during the trial. Section 246 (2) of the CPA stipulates:

> "(2) *Upon appearance of the accused person before it, the subordinate court* ***shall read and explain or***

cause to be read to the accused person the information brought against him as weii as the statements or documents containing the substance of the evidence of witnesses whom the Director of Public Prosecutions intends to call at the trial. *"[emphasis added]*

The extra judicial statement which Mr. Mwandoloma sought reliance in support of his quest for a retrial was not part of the documents read out to the appellant during the committal proceedings. That means, ordering a retrial will not serve the best interest of justice; it will only enable the prosecution to try and fill in gaps in its insufficient evidence to sustain the charge.

The cumulative effect of the foregoing is that the prosecution's case will, as of necessity, be from oral testimonies of the witnesses listed at the committal proceedings without the cautioned and extra judicial statements. That being the case, we have no slightest doubt holding, as we do that a retrial will not be desirable in the peculiar circumstances of this case coupled with the fact that the appellant will be standing trial for the third time on the same offence. Having so held, we accept Mr. Mkumbe's invitation to refrain from ordering a retrial albeit for reasons other than those he canvassed in his submissions.

Consequently, having quashed conviction and set aside the sentence we order that interest of justice dictates in ordering the immediate release of the appellant from custody unless held therein lawfully for any other purpose.

It is so ordered.

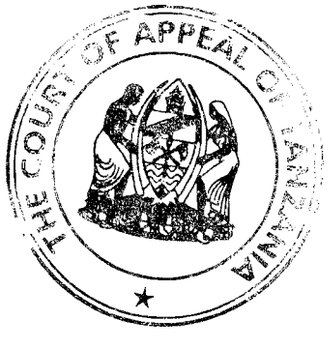
DATED at **MBEYA** this 26th day of February, 2021.

S. A. LILA
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

The judgment delivered this 25th day of February, 2021 in the presence of the Appellant in person, unrepresented through video conference and Ms. Prosista Paul, 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