IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MKUYE, J.A., WAMBALI, J.A. And GALEBA, J.A.)

CRIMINAL APPEAL NO. 125 OF 2019

SHADIDA ISSA @ RASTA.....1ST APPELLANT
OMAR JUMA KONDO.....2ND APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Dar es Salaam)

(Luvanda, J.)

Dated the 27th day of March, 2019
in
Criminal Sessions Case No. 21 of 2017

JUDGMENT OF THE COURT

26th May, & 7th October, 2021.

WAMBALI, J.A.:

The High Court of Tanzania sitting at Dar es Salaam (Luvanda, J.), convicted the appellants, namely; Shadida Issa @ Rasta and Omar Juma Kondo of the offence of murder contrary to the provisions of section 196 of the Penal Code, Cap 16 R. E. 2002 (now R.E. 2019). Consequently, they were sentenced to suffer death by hanging. Noteworthy, the third accused, namely; Yasin Buruhani @ Kiziwi (not a party to this appeal) who was charged together with the appellants was acquitted of the offence of murder.

According to the information which was laid at the trial court, it was alleged that on 30th March, 2015 at Makumbusho area within Kinondoni District in Dar es Salaam Region, the appellants together with the third accused mentioned above murdered Jeremia Sipite.

At the trial, to support its case the prosecution paraded six witnesses and tendered one exhibit. Briefly, it was the prosecution evidence in support of the case against the appellants that on the fateful date the appellants and the other person who had gone to Makumbusho area for purpose of obtaining food attacked the deceased (a watchman at that place) with a knife and 'panga' on various parts of his body. Following the alleged attack, the deceased was rushed to Mwananyamala Government Hospital for treatment, but he passed away later on the same day. The medical evidence contained in the post mortem report revealed that the cause of death was due to head injury (traumatic injury on the head), multiple wounds and severe bleeding on ears, nose and mouth. According to the record of appeal, upon confirmation of the said death, the appellants and the other person were arrested and charged in connection with the offence of murder.

In their respective defences, the appellants and the other person who defended themselves and had no witnesses to summon in support of their

defence, spiritedly denied the allegation of unlawfully causing the death of the deceased on the alleged date and particular place.

Nevertheless, at the height of the trial, the trial High Court judge believed the prosecution version of evidence and disbelieved the appellants' defence. Consequently, he found that the evidence of the prosecution had fully established the case against the appellants beyond reasonable doubt. He thus found the appellants guilty, convicted and sentenced them as alluded to above. On the other hand, as intimated above, the third accused was acquitted of the offence of murder for lack of evidence to substantiate the allegation.

The finding of the trial court did not augur well with the appellants, hence the instant appeal. To express their dissatisfaction, initially they jointly lodged a memorandum of appeal comprising seven grounds of appeal. Later on they also jointly lodged a supplementary memorandum of appeal containing six grounds of appeal. However, for the reason which will be apparent shortly, we do not intend to reproduce hereunder the detailed facts of the case and the respective grounds contained in both memoranda of appeal.

When the appeal was placed before us for hearing, Mr. Jeremiah Mtobesya and Mr. Sudy Zidadi Mikidadi, learned counsel appeared for the first and second appellants, whereas Ms. Faraja George learned Senior State Attorney assisted by Ms. Ester Martin, learned State Attorney appeared for the respondent Republic.

At the very outset, before we considered the grounds of appeal in both memoranda of appeal, we noted some omissions in the trial court's proceedings with regard to the propriety of the trial judge's summing up notes to the assessors. Particularly, on perusal of the summing up notes to the assessors we noted that the trial judge did not properly and adequately sum up the substance of the evidence and direct assessors on vital points of law which were apparent in the case at the trial. More particularly, the vital points of law involved issues of malice afore thought, the existence of a fight, visual identification, direct evidence, common intention and cautioned statement. To this end, the crucial issue for determination is whether the omission diminished the meaningful participation of assessors at the trial. We asked ourselves this question as from the record of appeal, it seemed to us that the opinion of assessors given to the trial judge after the summing up of the evidence for both sides reflected their failure of appreciating the

substance of the facts in relation to the vital points of law involved in the case as required by law. In the circumstances, we required counsel for the parties to respond to the raised query.

Responding to the query, Mr. Mtobesya conceded that the record of appeal bears testimony to the fact that in his summing up notes the trial judge did not properly and adequately sum up the substance of the evidence of the case to the assessors as required by law. He submitted further that apart from the trial judge's omission to sum up adequately the substance of the evidence adduced at the trial by the parties, he also did not direct assessors on vital points of law which he later exposed and relied on in the judgment in reaching the finding that the appellants are guilty of the offence of murder.

In this regard, Mr. Mtobesya contended that as the respective vital points of law were important in determining the final verdict of the case, the trial judge was required to explain and direct the assessors properly. In his submission, the explanation and direction would have enabled assessors to give fair opinion based on how they appreciated and perceived the evidence adduced by both sides of the case in relation to the law. He added that the

said omission by the trial judge rendered the entire trial a nullity as the assessors did not participate fully during the trial.

In the circumstances, the learned counsel implored the Court to nullify the proceedings of the trial court, quash convictions and set aside the sentences imposed on the appellants as they were greatly prejudiced by the omission of the trial judge's failure to comply with the requirement of the law. However, with regard to the way forward, Mr. Mtobesya strongly urged the Court to acquit the appellants on the contention that the substance of the evidence in the record of appeal is not sufficient to ground the appellants' conviction of the offence of murder. Indeed, it was his firm submission that a retrial will not be in the interest of justice as it will enable the prosecution to fill up the gaps in its case contrary to the settled position of the law.

In reply, Ms. Martin out rightly supported Mr. Mtobesya's submission on the pointed out omission occasioned by the trial judge and the consequences which should follow on the status of the trial court's proceedings. She thus urged the Court to nullify the trial court's proceedings, quash convictions and set aside the sentences imposed on the appellants.

However, the learned Senior State Attorney categorically disagreed with the submission by Mr. Mtobesya on the proposed way forward. In her

submission, the proper course to be taken by the Court after nullifying the trial court's proceedings is to order a retrial of the case before another judge and a new set of assessors. In her firm opinion, according to the record of appeal, the prosecution has sufficient evidence to prove that the appellants committed the offence of murder. Indeed, she argued that in the circumstances of this case, a retrial will be in the interest of justice as all parties were prejudiced by the omission that was occasioned by the trial court.

Having heard the submissions of counsel for the parties, it is clear that they are in agreement on the vividly exposed failure of the trial judge to sum up the substance of the evidence of the parties adequately and to direct assessors on vital points of law and the consequences which should follow. However, they distinctly differ on the what should be the relevant order of the Court after nullifying the proceedings of the trial court. Therefore, the crucial issue for our determination at this point is on the way forward with regard to the fate of the appellants.

In the first place, we entirely agree as correctly submitted by both counsel that, according to the record of appeal, there is no dispute that the trial judge did not properly and adequately sum up the substance of the

evidence of the case and direct assessors on vital points of law during the summing up. We are satisfied that the four pages summing up notes by the trial judge do not vividly include the substance of the evidence adduced for both sides of the case and the direction to the assessors on vital points of law as required by law.

In this regard, we wish to preface our deliberation on this matter by emphasizing that participation of assessors in homicide proceedings before trial courts is clearly regulated by the provisions of section 265 of the Criminal Procedure Act, Cap 20 R.E. 2019 (the CPA). Besides, it is acknowledged that full participation of assessors is further secured by the provisions of section 298 (1) of the CPA which requires trial judges at the conclusion of the hearing of the evidence for both sides to sum up the case adequately to the assessors on the facts in relation to the law. On the other hand, a close reading of the provisions of section 298 (1) may imply that summing up to assessors is not a mandatory requirement of the law. Indeed, though the opinions of assessors are not binding on the trial judge in terms of section 298 (2) of the CPA, the value of their opinions greatly depends on the extent of the information given to them on the substance of the evidence in relation to

the law involved in the particular case during the summing up (see **Andrea Ngura v. The Republic,** Criminal Appeal No. 15 of 2013- unreported).

To this end, there are plethora of decisions of this Court on the settled position that failure of the trial court to comply with the provisions of section 298 (1) of the CPA is fatal to the proceedings. Thus, as correctly submitted by the counsel for the parties, in the instant appeal, failure of the trial judge to sum up the substance of the evidence in the case to assessors properly and adequately and non-direction on vital points of law is fatal rendering the entire proceedings a nullity. At this juncture, it is instructive to make reference to the decision of the Court in **Said Idd Mshangama @ Senga v. The Republic,** Criminal Appeal No. 8 of 2014 (unreported), where it was held that: -

> *"...As provided under the law, a trial of murder before the High Court must be with the aid of assessors. One of the basic procedure is that the trial judge must adequately sum up to the said assessors before recording their opinions. Where there is inadequate summing up, non-direction or misdirection on such vital point of law to assessors, it is deemed to be a trial without the aid of assessors and renders the trial*

*a nullity (see **Rashid Ally v. The Republic,** Criminal Appeal No. 279 of 2010 – unreported)."*

[For similar position see also the decisions of the Court in **Khamis Nassor v. S.M. Z.** [2005] TLR 228, **Hatibu Gandhi v. The Republic** [1996] TLR 12 and **Masolwa Samwel v. The Republic**, Criminal Appeal No. 266 of 2014 (unreported)].

Furthermore, in **Tulubuzya Bituro v. The Republic** [1982] T. L. R. 264, the Court made reference to the *ratio decidendi* in the decision of the English case in **Bharat v. The Queen** (1959) AC 533 and observed as follows: -

"Since we accepted the principle in Bharat's case as being sensible and correct, it must follow that in a criminal trial in the High Court where assessors are misdirected on a vital point, such trial cannot be construed to be a trial with the aid of assessors. The position would be the same where there is a non-direction to the assessors on vital point."

Moreover, in **Omari Khalfan v. The Republic,** Criminal Appeal No. 107 of 2015 (unreported) the Court emphasized the importance of summing

up to assessors on facts and vital points of law to enable them give informed opinion by stating as follows: -

> *".....the assessors must be summed up on facts and every vital points of law so as to give the Court an informed verdict.... the ailment vitiates the entire proceedings; for it is impossible to know what the assessors would have said had the vital points of law been put to them".*

In the instant appeal, we are satisfied that the omission of the trial judge to sum up the substance of the evidence of the case properly and adequately and non-direction to assessors on the vital points of law diminished their participation at the trial. Definitely, in the circumstances of what is apparent in the summing up notes to the assessors in the record of appeal, the omission rendered the entire trial a nullity to the extent of the proceedings being nullified for occasioning miscarriage of justice. We are of the firm view that the opinion that were given by the assessors after the summing up demonstrates their lack of adequate appreciation of the evidence adduced by both sides and non-direction on the vital non points of law.

However, in the present appeal, before we nullify the trial court's proceedings, we are mindful of the contending positions of learned counsel

for the parties with regard to the way forward on the fate of the appellants. Admittedly, while the appellants' counsel pressed us not to order a retrial on the contention that the substance of the evidence in the record of appeal the prosecution case has no foundation upon which to ground convictions of the appellants, the respondent's counsel maintained that in the circumstances of the case at hand a retrial will be in the interest of justice.

We have carefully examined and weighed the contending arguments made by the counsel for the parties. On our part, in the light of the factual setting and the circumstances of the case at hand, we are of the considered opinion that a retrial will be in the interest of justice. It suffices at this juncture to state that we entertain no doubt that both sides of the case were prejudiced by the omission of the trial court in the conduct of the original trial.

Ultimately, as the issue of omission was raised *suo motu* by the Court and conceded by counsel for the parties, we exercise our power of revision under section 4(2) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2019 to revise and nullify the entire trial court's proceedings in Criminal Sessions Case No. 21 of 2017, quash convictions and set aside the sentences of death imposed on the appellants.

Consequently, we order that the appellants should be retried expeditiously before another judge and a different set of assessors. We further order that in the meantime the appellants should remain in custody pending a retrial.

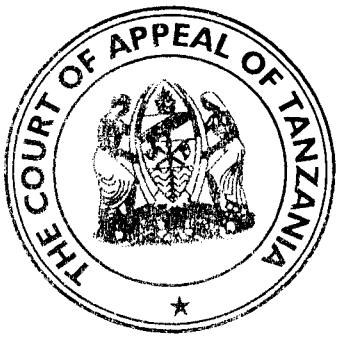
DATED at **DAR ES SALAAM** this 6th day of October, 2021.

R. K. MKUYE
JUSTICE OF APPEAL

F. L. K. WAMBALI
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

The Judgment delivered this 07th day of October, 2021 in the presence of appellants in person linked via video conference from Ukonga Prison and Ms. Esther Kyala, learned Senior State Attorney linked via video conference from DPP's office Dar es Salaam for the Respondent/Republic, is hereby certified as a true copy of the original.



G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL