IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: WAMBALI, J.A., MWANDAMBO, J.A. AND KITUSI, J.A.)

CRIMINAL APPEAL NO. 19 OF 2019

1. RAMADHANI S/O HASSAN @ NYANGALIO
2. ALLY S/O NASSORO @ NKUJUA ..... APPELLANTS

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Rumanyika, J.)

dated the 12th day of December, 2018.
in
Criminal Sessions Case No. 105 of 2016

.....

JUDGMENT OF THE COURT

21st September & 15th October 2021

KITUSI, JA.:

The High Court sitting at Dar es Salaam, convicted Ramadhani Hassan @ Nyangalilo and Ally Nassoro @ Nkujua, the first and second appellants respectively, with the murder of one Rahim Said @ Kondo, and imposed on them sentences which we shall refer to later in the course of this judgment. There was no dispute at the trial, that the said Rahim Said @ Kondo, the deceased, met an unnatural death on or about 26th or 27th November, 2015. He used to earn his living by riding a commercial motorcycle, popularly known as 'bodaboda' and suspicion

began when members of his family noticed that he did not return home on 26/11/2015 as usual. They mounted a search and managed to find his dead body.

From the sketchy notes that were taken by the learned Judge during the trial, it is not quite clear as to when the matter was reported to the police. If we go by the testimony of Asst. Inspector Azizi Abdul Zuberi (PW6) who was on duty at Ikwiriri police station on 27/11/2015, the disclosure of the death information to the police was dramatic. On that date, while in the company of a woman known as Tekla, the first appellant turned himself up to PW6 and told him that he had caused death of someone. Meanwhile, when the search team stumbled onto the body of the deceased, they suspected the second appellant and placed him under restraint. It is again not clear if this was simultaneous with the appellant's statement to the police that implicated the second appellant, or not. The first appellant allegedly made a statement to No. E. 7324 DC Mikaiah (PW3) too.

The two were charged as earlier shown.

In defence, the first appellant admitted administering the fatal blow that caused the death of Rahim, but qualified the circumstances under which the attack was made. He further stated that the second

appellant's role was merely in the form of giving him a hand to take the then wounded person to hospital. However, the wounded person died before the appellants could take him to hospital, so they dumped the body and cleared off the scene. In the course, the first appellant met Tekla before whom she confessed and the two proceeded to the police.

The second appellant's defence was consistent with that of the first appellant that he came in after the said first appellant had already committed what subsequently led to the death of the deceased.

The learned judge summed up the case to the assessors as per section 298 (1) of the Criminal Procedure Act [Cap. 20 R.E. 2002, now R.E 2019] (the CPA) and each assessor rendered an opinion as follows: -

> *"Assessor 1: The 1st accused killed only in the fight with the deceased. He is not responsible for murder. As for the 2nd accused could be accessory after the fact but not murder.*
>
> *Assessor 2: The 1st accused killed intentionally, had no reason to hit him, the 2nd accused aided the fellow.*
>
> *Assessor 3: The 1st accused just over reacted, should have held on and accordingly*

report the case. The 2nd accused the aider. That is all."

After considering the evidence in a flash, the learned Judge convicted the appellants with murder, but cited different grounds for each. In order not to dilute the style in which it was done, we shall reproduce excerpts of the decision. In respect of the first appellant, the learned judge said: -

> *"Whereas I also understand that proof of motive in homicide cases is immaterial, I entertain no doubts that human psychology is complex. At times malice aforethought may not be directly demonstrated by accused. But his conduct before, during or after the incident. The herein accused's malice aforethought could be, and is hereby inferred from the following: -..."*

The learned judge then listed down five clues from which he concluded that malice aforethought had been proved against the first appellant.

In respect of the second appellant, the learned judge had this: -

> *"With regard to the 2nd accused, he could not even be said that he conspired with the 1st accused to murder. But accessory after the fact.*

The 2nd accused therefore is responsible for the murder for two main reasons: -..."

Two reasons were cited to nail the second appellant to the cross. Consequently, the first appellant was detained during the President's pleasure in terms of section 26 (1) & (2) of the Penal Code, the learned judge having satisfied himself that at the time of the alleged murder, he was a child as defined by the Law of the Child Act, 2009. The second appellant was sentenced to death by hanging.

The appellants filed separate memoranda of appeal to challenge the conviction and sentences. Subsequently, the first appellant filed a supplementary memorandum of appeal raising two grounds. Four days before the date of hearing, another memorandum of appeal was filed by Vertex Law Chambers on behalf of both appellants.

At the hearing, Mr. Antipas Seraphin Lakam, learned advocate from Vertex Law Chambers, appeared to represent the appellants who were also present. Ms. Gladness Mchami and Ms. Elizabeth Olomi, learned State Attorneys stood for the respondent, the Republic. Immediately, Mr. Lakam said he was abandoning the memorandum of appeal filed by his law firm and announced that he would argue those grounds that had been preferred by the appellants themselves. He

sought, and we granted him leave, to commence with the second ground in the supplementary memorandum of appeal.

That ground reads: -

> *"2. That the learned trial Judge erred in law for not properly selecting the assessors and summing up, they were not addressed on vital points of law inter alia; the ingredients of the offence of murder, the evidential value of cautioned statement and evidential value of unfounded witness."*

Mr. Lakam pointed out facts that are obvious in the record but which were left out and not explained to the assessors by the learned trial judge during the summing up. These are; the fact that the second appellant joined the first appellant when the act leading to the deceased's death had been committed; the fact that on the evidence of the first appellant in defence the fatal blow was administered by him in reaction to the deceased's act of knocking him by a motorcycle; the fact that the cautioned statement was recorded outside the statutory time and; on the fact that the first appellant turned himself over to the police suggesting that he had no malice aforethought.

When counsel's attention was drawn to the process of selection of the assessors, he admitted that their names and qualifications were not disclosed in the coram until much later. He also admitted that the opinions expressed by the assessors show that they knew more than what had been summed up to them.

At first, Ms. Olomi, learned State Attorney was opposed to Mr. Lakam's position, but on reflection she agreed with him that the assessors' minds were not directed to the points that were vital for the determination of the case. She cited an example, that the second assessor opined that the second appellant was an accessory after the fact, but nowhere did the learned trial judge direct the assessors on that aspect.

Both Mr. Lakam and Ms. Olomi, submitted that the inadequate summing up and non – direction on vital points of law in this case rendered the proceedings a nullity. They prayed that the proceedings, be nullified, judgment quashed and sentences set aside. As for the way forward, they prayed that we should order a retrial.

We have to start with what is obvious, that trials before the High Court are to be with the aid of assessors according to Section 265 of the CPA, and that in order to comply with that statutory requirement, the

presiding judge or magistrate with extended jurisdiction must, under section 298 (1) of the CPA, obtain opinions of the assessors in a case. Case law, some of which we will refer to later, has made it mandatory for the presiding judge or magistrate with extended jurisdiction to sum up the case to the assessors before they are asked to give their opinions.

The immediate question for our consideration is whether the summing up in this case, was proper. The learned State Attorney and the counsel for the appellants are at one that the learned judge did not direct the assessors on some vital points of law, thus rendering the summing up improper.

With respect, we agree that the summing up was improper in a number of respects. The obvious and most grave irregularity in our view, is that some vital points that feature in the judgment as forming a basis of the trial court's decision, did not feature at all in the summing up notes. For instance, in the summing up, there is no mention of how malice aforethought could be inferred from the appellants' conduct. Neither is the concept, very technical in our view, accessory after the fact, although surprisingly, the lay members of the court alluded to it.

This is not to say that the selection and introduction of the assessors was flawless. During the initial stages, the assessors were only referred to by numbers, so as seen in the record of appeal, on 19th November, 2018 when PW1, PW2, PW3 and PW4 testified, the assessors were anonymous. The first time the names of the assessors appeared in the coram, was from 21st November, 2018 onwards.

Considering the arguments by Ms. Olomi, Mr. Lakam and the record of appeal, in relation to the second ground of appeal in the supplementary memorandum of appeal, we have no doubt that there is a legitimate concern to be addressed. We shall be guided by the oft quoted passage in the case of **Washington Odindo vs Republic** [1954] 21 EACA 392: -

> *"The opinion of assessors can be of great value and assistances to a trial judge but oniy if they fully understand the facts of the case before them in relation to the relevant law. If the law is not explained and attention not drawn to the salient facts of the case the value of the assessors' opinion is correspondingly reduced."*

This passage has been reproduced in many of our decisions to appreciate that principle, such as in **Charles Karanji @ Masangwa &**

Another vs Republic, Criminal Appeal No. 34 of 2016, **Monde Chibunde @ Ndishi vs The D.P.P.**, Criminal Appeal No. 325 of 2017 and; **Shija Sosoma vs D.P.P**, Criminal Appeal No. 327 of 2017 (all unreported).

In the present case it is plain as we have said, that some salient facts appearing in the judgment were not placed before the assessors in the summing up. Likewise, from the tone of the assessors' opinions, it seems they mysteriously got to know about the consequences of such concepts as accessory after the fact and death resulting from a fight which were conspicuously omitted in the summing up. More glaring is the learned judge's importation into the judgment, of facts that do not appear in the record of evidence. In **Shija Sosoma vs D.P.P** (supra) the Court had this to say: -

> *"Summing up the evidence under section 298 (1) of the CPA envisages evidence of witnesses as accurately recorded by the trial Judge. We think opinions of assessors will only be useful to the trial High Court if these opinions are based on a true and accurate account of what the witnesses actually said in court."*

Then, citing the case of **Thomas Julius vs Republic**, Criminal Appeal No. 498 of 2015 (unreported) it went on to reproduce the following passage from that case: -

> *"... the act of the trial resident magistrate to include in his judgment, facts which are not reflected in the recorded evidence in the proceedings. The implication here is that, either, in his judgment, the trial resident magistrate did include extraneous matters which did not completely feature in the evidence of the witnesses who were called to testify, or, the trial resident magistrate did omit to record a number of facts that were said by the witnesses in their testimony. In either case, we are inclined to join hands with the contention of the learned counsel for both sides that, the irregularity occasioned was fatal and did vitiate the entire proceedings of the trial court."*

With respect, we are afraid that the learned trial judge imported into the judgment, some conclusions that were not borne out of the evidence on record. We shall demonstrate this by reproducing a portion of the judgment, listing some factors for concluding that the appellants had malice aforethought: -

> *"**One**; having assaulted, knocked down the deceased and admittedly disserted him unconscious, he came back to the scene with the view, it appears, to assuring himself as to whether the deceased was really finished. **Two;** Now that the 1st accused was sure that the deceased wasn't any more, he removed it from the very scene and threw the dead body into a pit (**like was removing evidence or possibiy complicating subsequent investigations**). **Three**; shortly the accused robbed the deceased's motor bike (Exh. P5). **Like he murdered and robbed"**. (emphasis added)*

From the above, there is a possibility that some of the facts referred to by the learned judge in his judgment, were testified on but not recorded, or they were not testified on at all but formed the basis for his deducing malice aforethought on the first appellant. Whatever it is, it is clear that the assessors were never addressed on those facts and that is against the spirit of the settled law as referred to in the case of **Shija Sosoma vs D.P.P** (supra), that summing up presupposes that the trial judge accurately recorded the evidence.

We are aware of our many decisions to the effect that an inadequate summing up renders the trial a nullity for it is taken to be a

trial without the aid of assessors, therefore violative of section 265 of the CPA. See **Said Mshangama @ Singa vs. Republic**, Criminal Appeal No. 8 of 2014, **Alexander Stima vs. Republic**, Criminal Appeal No. 398 of 2017 and; **Joseph Anyelwise Kosamu & Another vs. the D.P.P** Consolidated Criminal Appeals No. 174 & 175 of 2017 (all unreported).

We are also aware of the position that for a summing up to be considered as affecting the trial, it must have left out points that are vital for the determination of a particular case and affected the opinion of the assessors, thereby prejudicing the appellant or leading to a miscarriage of justice. This is in line with the decision in the case of **Jackrine Exsavery vs Republic**, Criminal Appeal No. 485 of 2019 (unreported). We think not every misdirection or non – direction in the summing up is fatal even where it is on points that do not form the basis of the decision, and that is what we also said in **Emmanuel Stephano vs Republic,** Criminal Appeal No. 413 of 2018 (unreported). In the latter case we held in part: -

> *"However, after our careful consideration of the matter at hand, we hesitate to go along with Mr. Nkoko. This is because the decision of the trial court was mainly based on the evidence of*

confession which the appeliant is said to have made in the cautioned statement, therefore the summing up is mainly relevant only as far as it affects that evidence. To be fair to the learned trial Judge, we are satisfied that he directed the assessors on the length and breadth of the evidence of confession as submitted by Ms. Martin".

In the instant case, the learned judge did not direct the assessors on, at least four vital points which he subsequently relied on in deciding the guilt of the appellants. One, the meaning of confession by the first appellant and whether it was properly taken. Two, the consequences of killing in the course of a fight. Three, the role of an accessory after the fact. Four, how the conduct of the culprits mirrored their intent. The issues that stick out for our immediate consideration is whether the trial judge could choose which vital points to include in the summing up and which ones he could exclude. In the case of **Richard Venance Tarimo vs Republic** [1993] T.L.R 142, the trial Judge had misdirected the assessors on the issue of provocation, and the Court considering provocation a vital point in that case, went on to hold: -

"Thus, before a conviction for murder can be upheld in a situation where there was a

misdirection or no – direction on the question of provocation, the following two conditions must be present. Firstly, the omission must have been deliberate on a view of the evidence taken by the Judge. Secondly, the Judge must have made a specific finding so that it is clear to this Court that he would in any case have overridden the opinions of the assessors to the contrary".

Similarly, in this case, we think the learned judge's non - direction on the four vital points would have been harmless either if the said points did not form the basis of the decision, or if the two conditions mentioned above were met. However, neither was the case.

In the case of **Richard Venance Tarimo vs Republic** (supra) the Court allowed the appeal as a result of the non – direction. However, in the present case the prayer by both the learned State Attorney and the defence counsel is for a retrial. With respect, the justice of this case requires a retrial because the facts are different though not diametrically. Since even the procedure for the selection of the assessors was not as meticulous, we invoke section 4 (2) of the Appellate Jurisdiction Act, [Cap 141 R.E 2019] (the AJA) to nullify the entire proceedings, quash the convictions and set aside the sentences.

Having taken that position, we need not discuss the other grounds of appeal touching on the merit of the appeal, because what we have discussed disposes of the appeal. We order an immediate retrial before another judge sitting with a new set of assessors. Meanwhile, the appellants shall remain in custody to await for the retrial. It is so ordered.

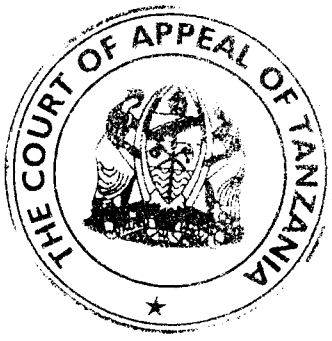
DATED at **DAR ES SALAAM** this 11th day of October, 2021.

F. L. K. WAMBALI
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

This Judgment delivered on 15th day of October, 2021 in the presence of the appellants in person, and Ms. Estazia Wilson, learned State Attorney for the respondents/Republic, is hereby certified as a true copy of the original.



G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL