IN THE COURT OF APPEAL OF TANZANIA

AT BUKOBA

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

CRIMINAL APPEAL NO. 424 OF 2019

PETER KUNAMBI @ MKUDE.....APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania, (District Registry) at Bukoba

(Kilekamajenga, J.)

dated the 25th day of July, 2019

in

Criminal Sessions Case No. 46 of 2017

JUDGMENT OF THE COURT

22nd & 25th November, 2021

MUGASHA, J.A.:

This is an appeal against the decision of the High Court of Tanzania, Bukoba Registry in which Peter Kunambi @ Mkude, the appellant was charged and convicted with the offence of murder contrary to section 196 of the Penal Code [Cap 16 RE 2002]. It was alleged by the prosecution that, on the 4/1/ 2016 during night hours at Michigan Guest House within the municipality of Bukoba in Kagera Region, the appellant did murder one Grace d/o Edward. He denied the charge following which, in order to

establish its case, the prosecution paraded a total of six (6) witnesses and tendered three (3) documentary evidence namely; the appellant's caution statement, the postmortem examination report and the forensic toxicology analysis report. (Exhibits "P1", "P2" and "P3") respectively. The appellant defended himself and tendered two documentary exhibits namely; the Patient Admission Certificate and the Radiology/ Medical Imaging Request and Report Form (exhibits "D1" and "D2" respectively).

Briefly, the prosecution account was to the effect that, the appellant a driver of the Express Bus Service, had an extra marital relationship with the deceased who was a wife of Peter William (PW1). The said relationship was alleged to have commenced sometimes in 2014 after the deceased intimated to the appellant that despite having one child, she was not yet married. During the pendency of the said affair, the deceased introduced the appellant to her aunt and he was told to prepare dowry price amounting to TZS. 2,000,000/=. Following the said introduction, from 1/1/2015, the deceased's child and her younger sister started residing in the same house with the appellant. In 2015 July, the appellant got wind from his fellow tenant that the deceased was inviting other men in the house. Therefore, from October, 2015 the appellant began to travel together with the deceased from Mwanza to Bukoba and they used to keep

up at Michigan Guest House. Sometimes in December, 2015 while the appellant was in Bukoba, the deceased who was in Mwanza decided to go back to her aunt despite the appellant's plea not to do so. Upon his return to Mwanza, the appellant found the deceased not in the house and except for the clothes, his other belongings such as, Mining Operator certificate, his cash money TZS. 3,800,000/= and furniture were missing. This prompted the appellant to follow up the matter which took him to the homestead of the deceased's husband. Upon being inquired, the deceased disclosed to have burnt the certificate and that she had given the money to her husband so that he could do business. That apart, the duo moved on to the appellant's house and later they agreed to travel together to Bukoba in order to resolve their differences. At Bukoba they were booked at room No. 8 Michigan Guest House where they spent a night. On the following morning, a guest attendant one Devotha Rugarabamu (PW3) who on the previous day had received the appellant and the deceased, became suspicious upon finding that the door of the room remained closed late in the morning. She notified the appellant's colleague a bus conductor of Complex Bus Express, one Samson Kaguta (PW2) so that he informs the appellant to return the key. As the appellant could not be traced, the guest attendant asked for a spare key and in the presence of a Ward Executive

Officer, the door of the room was opened only to find the deceased lying dead on the mattress and had marks on the throat suggesting that she was probably strangulated. They also found in the same room packets of strong alcohol and rat poison. The matter was reported to the Police and the deceased's husband on arrival at Bukoba confirmed the death of his wife.

Domician Dominic (PW6), the doctor who examined the body of the deceased, established that the death was caused by both strangulation and poisoning. Subsequently, the samples of parts of the deceased body were taken to the Government Chemist where it was established that the swabs from the mouth, liver, small intestines and parts of a stomach and blood of the deceased had contents of elements of phosphorus.

As the appellant had fled to Dar-es-Salaam he was arrested there on 23/3/2016, taken to Bukoba and recorded cautioned and extra judicial statements. In both statements, apart from stating to be unaware of the death of the deceased and denying to have caused her death, he admitted to have strangled her in a bid to defend himseif as he could not stand the pain of his genitals being pulled by the deceased.

After a full trial, the learned trial Judge summed up the evidence to the assessors who returned a verdict of not guilty on grounds that: **One,**

the death occurred while the appellant was defending himself after the deceased pulled his private parts; **two,** missing linkage between the toxicologist report and samples of the body parts of deceased which weakened the strength of circumstantial evidence. Upon being satisfied that the prosecution account was true and having disagreed with the unanimous verdict of the assessors on the guilt, the trial Judge convicted the appellant with murder and sentenced him to death by hanging.

Aggrieved, the appellant has preferred the present appeal to the Court. In the memorandum of appeal, the appellant raised the following three grounds of complaint namely:

1. That, the learned trial Judge erred in law and in fact to convict the appellant basing on the Post Mortem Examination Report (Exh. P2) which was suspicious, uncorroborated and a mystery in respect of the cause of death.
2. That, the learned trial Judge erred in law by failure to fully involve the assessors in the whole trial.
3. That, the learned trial Judge erred both in law and in fact to convict the appellant basing on weak and suspicious evidence.

At the hearing, in appearance was Mr. Peter Joseph Matete, learned counsel for the appellant and Messrs. Hezron Mwasimba, learned Senior State Attorney and Joseph Mwakasege, learned State Attorney, for the respondent, Republic.

As the second ground of appeal had a bearing on the legality or otherwise of the trial, we urged parties to address it first.

On taking the floor, it was Mr. Matete's submission that the assessors were not fully involved in the trial as they were not given opportunity to ask questions to the witnesses. He pointed out this as evident in the record of appeal as follows: at page 20 of the record of appeal whereby none of the assessors did put questions to the witnesses; at pages 23, 28, 20 and 40 only one assessor was allowed to put questions to Devotha Rugarabamu (PW3) and WP 4435 Det. Cpl Devotha (PW4,) and Domician Dominic (PW6). He added that, the assessors were not directed on a vital point of law on the meaning of the last person to be seen with the deceased and yet the learned trial Judge relied on the principle to convict the appellant. Mr. Matete argued this to be a fatal omission which vitiated the trial. On the way forward, he urged the Court to allow the appeal on ground that the prosecution evidence on record is not sufficient to warrant

a retrial. On this, he contended that from what can be discerned in the autopsy report, it cannot be ascertained if the deceased died because of strangulation or poison considering that the appellant left the deceased alive in the room before proceeding to Dar-es-Salaam.

The learned State Attorneys opposed the appeal. Apart from conceding that, the assessors were not fully involved as they were not given opportunity to put questions to witnesses, they argued that, in the light of overriding objective principle, the omission is minor and is no longer fatal as such, the trial which is a subject of this appeal was not vitiated to warrant a retrial. To support the propositions, they cited to us the case of **JACKRINE EXSAVERY VS THE REPUBLIC,** Criminal Appeal No. 485 of 2019 (unreported). Moreover, besides, conceding that the learned trial Judge did not direct the assessors on the vital point of law relating to the principle of the last person to be seen with the deceased, they urged us instead of ordering a retrial, to nullify the Judgment and quash the summing up notes with a direction that the trial Judge make a proper summing up to assessors before composing a judgment. In this regard, they argued against a retrial and urged the Court to dismiss the appeal and sustain the conviction of the appellant.

Having carefully considered the record before us, grounds of appeal and the submissions of learned counsel from either side, they are at one that the assessors were not fully involved in the trial as they were not given opportunity to ask questions to the witnesses; and secondly, the assessors were not addressed on a salient point of law relating to circumstantial evidence relied upon to convict the appellant. However, they parted ways on the way forward.

We begin with the position of the law regulating the role of assessors in a criminal trial. A requirement that when the High Court conducts a criminal trial, it must sit with assessors is a creature of the provisions of section 265 of the Criminal Procedure Act [CAP 20 R.E.2019] which stipulates as follows:

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

In the course of the trial, the law mandates the assessors with power to put questions to witnesses as stipulated under the provisions of section 177 of the Evidence Act [CAP 6 R.E.2019] which stipulates as follows:

> *"In cases tried with assessors, the assessors may put any questions to the witness, through or by*

leave of the court, which the court itself might put and which it considers proper".

Relating to the power of assessors to put questions to assessors, Sarkar's Law of Evidence 17th Edition 2010 Volume II at page 2895 to 2896 comments on section 166 of the Indian Evidence Act which is similar to our section 177 of the Evidence Act as follows:

> ***"S. 166 Power of jury or assessors to put questions-*** *in cases tried by jury or with assessors may put any questions to the witnesses, through or by leave of the Judge, which the Judge himself might put and which he considers proper.*
>
> ***Principles and scope*** *– this section empowers the jury or assessors to put any questions to the witness, through or by leave of the Judge which the Judge himself might put and which the Judge considers proper...."*

The essence of the power of assessors under section 177 of the Evidence Act was emphasized in the case of **BERNADETA BURA @ LULU VS REPUBLIC,** Criminal Appeal No. 530 0f 2015 (unreported), the Court stated:

> *"One, the High Court to avail the assessors with adequate opportunity to put questions to witnesses*

as provided for under s. 177 of the Evidence Act, Cap 6 R.E 2002. ***Through asking questions to witnesses, the assessors will help the Court to know the truth.*** *Two, which is relevant to our case, is that in terms of section 298 (1) of the CPA when the case on both sides is closed, the judge is required to sum up the case and then take the opinions of assessors..."*

[Emphasis supplied]

Therefore, the role of the assessors will be meaningful if they actively and effectively participate in the proceedings before giving their opinion at the conclusion of the trial and before judgment is delivered. Corresponding remarks were reiterated by the Court in the case of **THE GENERAL MANAGER KIWENGWA STRAND HOTEL VS ABDALLA SAID MUSSA,** Civil Appeal No. 13 of 2012 (unreported) which originated from the employment cause whereby, two assessors present throughout the trial were disabled from effectively participating at the trial. Thus, the Court relied on the case of **ABDALLAH BAZAMIYE AND OTHERS VS THE REPUBLIC** [1990] TLR 42 at 44 having held:

"...it is apparent that the two assessors who remained in the conduct of the proceedings up to the end, were disabled from effectively participating

and " aiding the trial judge who would have otherwise benefited fully if he took into judicious account all the views of his assessors...their full involvement... was an essential part of the process...Denying the assessors of their statutory right as provided under the Act rendered their participation ineffective and led to a mistrial and consequential miscarriage of justice."

The Court declared the trial a nullity and ordered a trial *de novo*.

As earlier stated, section 265 of the CPA mandatorily requires a criminal trial at the High Court to be conducted with the aid of assessors. This Court had the occasion of interpreting words "with the aid of assessors" in the case of **OMARI KHALFAN VS REPUBLIC**, Criminal Appeal No. 107 of 2015 (unreported) having stated:

"The trial "with the aid of assessors" under section 265 of the CPA has been interpreted by this Court as to require the trial High Court Judge to give the assessors adequate opportunities to put across questions and after the close of evidence from prosecution and defence, to sum up and obtain the opinion of assessors."

This position was followed in the case of **ESTER LEONARD MCHAPE VS REPUBLIC**, Criminal Appeal No. 212 of 2017 (unreported) as the Court among other things, categorically said:

> *"As we said in Omari Khalfan v Republic, Criminal Appeal No. 107 of 2015 (unreported); trial "with the aid of assessors" under section 265 of the CPA entails requiring the trial High Court Judge to give the assessors adequate opportunities to put across questions to witnesses and after the close of the evidence from the prosecution and defence, to sum up and obtain the opinion of assessors."*

In yet another case of **SELINA YAMBI AND TWO OTHERS VS REPUBLIC,** Criminal Appeal No. 94 of 2013 (unreported) the Court cited the case of **CHARLES LYATII @ SADALA VS REPUBLIC**, Criminal Appeal No. 290 of 2011 (unreported) where the Court emphasized the crucial role of assessors at the criminal trial before the High Court as follows:

> *"...to avail the assessors with adequate opportunity to put questions to witnesses from both sides and the same should be clearly recorded....."*

Since it is settled that, assessors must be given opportunity to ask witnesses questions in accordance with the law, even if the assessor has

no question to ask, the proceedings should show his/her name and mark "NIL" or else it will be concluded that he/she was not offered the opportunity to ask questions and did not actively participate in the conduct of the trial. See: **SAMSON NJARAI AND ANOTHER VS JACOB MESOVORO,** Civil Appeal No 98 of 2015 (unreported).

The essence of enabling assessors to put questions to the witnesses and summing up the evidence will enable them to fully understand the facts of the case before them and in relation to the relevant law. This will make them to be informed and make rational opinions as to the guilt or otherwise of the accused person.

In the present case, as correctly submitted by the learned counsel, from what is apparent on the record, it is glaring that although the assessors were present throughout the conduct of the trial, they were denied statutory right as prescribed under section 265 of the CPA and section 177 of the Evidence Act and consequently disabled from effectively participating and aiding the trial judge. In the premises, it cannot be safely vouched that the appellant who was facing a serious offence of murder which attracts death penalty was fairly tried because what transpired at the

trial correspondingly reduced and diminished the value of assessors' opinions.

At this juncture, we are satisfied that the case at hand is distinguishable from the case of **JACKRINE EXSAVERY VS REPUBLIC** (supra) cited to us by the learned State Attorney. We are fortified in that regard because: **one,** the Court did not consider the provisions of section 177 of the Evidence Act which mandates assessors with power to put questions to witnesses in a criminal trial; and **two,** not considering earlier Court decisions which interpreted the meaning of words "with the aid of assessors" embraced in section 265 of the CPA when the High Court conducts a criminal trial. Besides, in the said case, the record showed that assessors whose answers were not recorded had nothing to ask and the trial Judge did not record answers of those assessors who had questions to ask.

Next, we agree with the learned counsel that during the summing up the assessors were not directed on the salient point of law on the meaning of the principle of "the last person to be seen with the deceased" which is the gist of circumstantial evidence relied upon to convict the appellant. In the case of **MASOLWA SAMWEL VS REPUBLIC,** Criminal Appeal No.

206 of 2014 (unreported), the Court had the occasion of expounding on the essence of directing assessors on vital points of law having said as follows:

> *"There is a long and unbroken chain of decisions of Court which all underscore the duty imposed on trial High Court judges who sit with the aid of assessors* ***"on all vital points of law".*** *There is no exhaustive list of what are the vital points of law which the trial High Court should address to the assessors and take into account when considering their respective judgments."*

The rationale of sitting with assessors is that their opinions can be of greater value and assistance to the trial Judge which can only be achieved if the assessors fully understand the facts of the case before them in relation to the relevant law. In the premises, if the law is not explained and attention not drawn to salient facts of the case, the value of assessors' opinions is correspondingly reduced. **See: WASHINGTON S/O ODINDO VS REPUBLIC** [1954] 21 EACA CA 394.

In the case under scrutiny, it is vivid that the appellant's conviction was partly based on the principle of the last person to be seen with the deceased which in essence is the gist of circumstantial evidence.

Unfortunately, the trial Judge did not make an attempt to explain to the assessors the nature, applicability and reliability of the vital point of law relating to the requisite evidence. As such, it goes without saying that, the value of the respective opinions of the assessors was correspondingly reduced which is not compatible with what is envisaged under sections 298 (1) and 265 of the CPA. Again we are satisfied that such omission vitiated the entire proceedings and consequently rendered the trial conducted without the aid of assessors.

Moreover, since the requirement of involving assessors in a criminal trial and their power to put questions to witnesses are creatures of the law, under article 107B of the Constitution the Court is enjoined to follow the letter of the Constitution and the law in the exercise of its judicial functions. Therefore, the omission to comply with the mandatory dictates of the law cannot be glossed over as mere technicalities as suggested by Mr. Joseph Mwakasege. See - **ZUBERI MUSSA VS SHINYANGA TOWN COUNCIL,** Civil Application No. 100 of 2004 (unreported).

In view of what we have endeavoured to explain we are satisfied that the purported trial is a nullity having been conducted in violation of the mandatory dictates of the law and its proceedings and judgment

cannot be spared. We allow the appeal, nullify the proceedings and judgment, quash the conviction and set aside the sentence meted on the appellant. Considering the gravity of the offence with which the appellant was arraigned upon, we order an expedited retrial before another judge with a new set of assessors. Meanwhile the appellant should remain in custody.

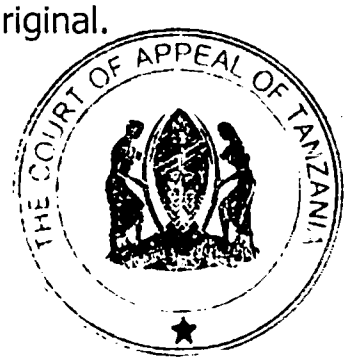
DATED at **BUKOBA** this 24th day of November, 2021.

S. E. A. MUGASHA
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

The judgment delivered this 25th day of November, 2021 in the presence of the appellant in person and Mr. Hezron Mwasimba, learned Senior State Attorney assisted by Mr. Joseph Mwakasege, learned State Attorney for the respondent Republic, is hereby certified as a true copy of the original.



B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL