IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: MKUYE, J.A., KWARIKO, J.A. And MAIGE, J.A.)

CRIMINAL APPEAL NO. 204 OF 2020

JUMANNE MAHENDE WANG'ANYI.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Mwanza)

(Rumanyika, J.)

dated the 13th day of March, 2020
in
Criminal Sessions Case No. 131 of 2017

JUDGMENT OF THE COURT

1st & 3rd December, 2021

KWARIKO, J.A.:

The appellant was arraigned before the High Court of Tanzania at Mwanza charged with two counts of murder contrary to sections 196 and 197 of the Penal Code [CAP 16 R.E. 2002, now R.E. 2019]. The particulars of the offence were that on the 13th day of July, 2015 at Nyakato Boma Area within Nyamagana District in the City and Region of Mwanza, the appellant murdered one Ally Mohamed Abeid and Claud Stephen Sikalwanda (the first and second deceased respectively). The appellant denied the charge following which the prosecution brought a

total of twelve witnesses to prove it. On the other hand, the appellant was the sole witness for the defence side.

At the end of the trial, the trial court found that the prosecution case was proved beyond reasonable doubt that the appellant killed the deceased persons with malice aforethought. He was convicted in all counts and sentenced to suffer death by hanging. Aggrieved by that decision, the appellant is before this Court on appeal.

The following are material facts which led to this appeal. The appellant a businessman, had his office at Nyakato Boma area within the City of Mwanza. On the fateful night at about 21:00 to 22:00 hours, Alfred Mwita Chacha (PW6) who was employed by the appellant as an accountant, and Boniphace Joseph (PW10) a security guard -cum-storekeeper were in the office. Whilst there, two persons who were later identified as the two deceased persons came and asked to talk with the appellant in private. They stood at an invisible corner hence the witnesses could not see or hear them. Shortly thereafter, they heard gun shots and out of fear, PW6 ran away. On his part, PW10 saw the appellant chasing and shooting one of those visitors. And before he was shot, he heard that person saying "*umetuita uje utupe hela kumbe*

unakuja kutuua" literally meaning *"you have summoned us so as you could give us money, instead you are killing us."*

Earlier on, according to Aziza Stephen Sikalwanda (PW1), a sister to the 2nd deceased, on the same night, her brother left home at 21:00 hours to meet the appellant for their deal concerning TZS 25,000,000.00 but he did not return home alive until she learnt of his death the following day. Similarly, Dominatha Gabriel (PW2), the widow of the 1st deceased testified that, her husband had travelled to Sirari with the 2nd deceased and the appellant on 9th July, 2015 and returned on 12th July, 2015, and that, on the material date he went to meet the appellant but never returned home.

Meanwhile, on his part, SSP Almachus Muchunguzi (PW11) received a phone call from the appellant informing him that he was invaded. Following which he sent policemen to the scene, including Inspector Benedict Manyanda (PW3) and No. E. 8611 Detective Corporal Joseph (PW7). At the scene of crime, the police found two dead bodies lying between motor vehicles. Besides the bodies, were two machetes and four rounds of golden pistol cartridges. The appellant was not at the scene until he was summoned by the police. When he got there, he

said that he had been invaded by the deceased persons, but, according to PW11, there were no signs of violence at the scene of crime.

Further, the police investigated into the communication on the appellant's phone where Inspector Masaga (PW4) from Cybercrime Unit testified to have discovered that the appellant had communicated with the 1st deceased on 10th May, 2015; 12th July, 2015; and 13th July, 2015. Whilst, Inspector John Mayunga Sangila (PW12) of Forensic Bureau, examined the pistol cartridges (exhibit P4) and found it corresponding to the appellant's owned pistol.

Further, the post-mortem examination on the bodies of the deceased persons was conducted by Dr Kahima Jackson (PW5) from Bugando Hospital who found the cause of the deaths to be haemorrhagic shock due to loss of blood. His report was posted on the post-mortem examination report which was admitted in evidence and marked exhibit P1. Similarly, a sketch map of the scene of crime; certificate of seizure; forensic examination report; and appellant's cautioned statement were admitted in evidence as exhibits P2, P3, P4 and P5 respectively.

The appellant was a sole witness in his defence. He did not deny the fact that he killed the deceased persons but he claimed that he did that in self-defence. He explained that while in his office on the material night, two persons appeared and asked to have a talk with him in private. They went to a corner area where shortly thereafter, one of the four bandits who had a machete grabbed him. Sensing danger, he took cover around there and shot dead two of the bandits with a pistol and on being scared, he fled the scene. He added that, on 12th July, 2015 at 20:30 hours, he had received a phone call from a person who offered to sell a house. The same person called again on 13th July, 2015 at 20:00 hours with the same proposal but he advised him to do business during the day hours.

After a full trial, the trial court found the prosecution case was proved beyond reasonable doubt against the appellant; he was convicted and sentenced as shown earlier.

In his appeal before this Court, the appellant has raised the following nine grounds:

"1. *That the Honourable trial Judge erred in law and in facts for failure to evaluate properly the evidence on record as a result arrived at a wrong conclusion.*

2. *That the Honourable trial Judge erred in law and in fact for ignoring and / or rejecting the evidence of [the] Appellant without sufficient reasons.*
3. *That the Honourable trial Judge erred in law and in fact for failure to observe that the prosecution evidence had full of contradictions and inconsistence.*
4. *That the Honourable Judge erred in law and in fact for holding that the prosecution case against the appellant was being proved beyond all reasonable doubts.*
5. *The Honourable trial Judge erred in law and in fact for shifting the burden of proof from the prosecution to the Appellant.*
6. *That the Honourable trial Judge erred in law and in fact for failure to interpret properly the provisions of section 18 of the Penal Code, Cap. 16 R.E. 2002 and failure to consider the fact [that] the Appellant was defending himself from being attacked by the two deceased persons.*
7. *That the Honourable trial Judge erred in law and in fact for completely misapprehending the substance, nature and quality of the evidence brought before him.*
8. *That the Honourable trial Judge erred in law and in fact for ignoring the opinion of the Honourable assessors without assigning reasons.*

9. That the Honourable trial Judge erred in law and in fact in convicting the Appellant for murder and sentenced him to suffer death by hanging.

On the day the appeal was called on for hearing, the appellant was represented by Messrs. Majura Magafu and Chaya Mlaki, learned advocates whilst Messrs. Emmanuel Luvinga and Hemedi Halidi Halifani, learned Senior State Attorneys appeared for the respondent Republic.

We heard the learned counsel for and against the appeal. However, for the reasons that will be apparent in due course, we propose to start our deliberation with the eighth ground of appeal. Mr. Magafu submitted in respect to this ground that, because in terms of section 298 (1) of the Criminal Procedure Act [CAP 20 R.E. 2019] (the CPA), all trials before the High Court should be by the aid of assessors, the trial Judge erred when he failed to consider the opinion of assessors without assigning reasons. He argued that the omission led to unfair trial which vitiated the judgment and thus benefits the appellant.

Mr. Halifani who supported the conviction and sentence, strongly opposed the foregoing by arguing that, at page 352 of the record of appeal, the trial Judge summarized assessors' opinion which in effect advised the trial Judge to enter a verdict of not guilty to murder but

manslaughter. Following that summary, the trial Judge explained why he thought the charge of murder was proved beyond reasonable doubt against the appellant. The learned counsel argued further that, though the trial Judge did not clearly indicate that he was differing with the assessors, the record shows that he did. He added that the omission is not fatal and even if it is found to be so, it is only the judgment that can be faulted and not the whole proceedings.

On our part, we agree with Mr. Magafu that the trial Judge did not consider the opinion of assessors apart from summarizing it. He said at page 352 of the record of appeal thus:

> *"The court assessors unanimously opined for the accused. That with respect to PW5 and the rest, the prosecution evidence was materially contradictory and inconsistent. Therefore, the case not proved beyond reasonable doubts."*

Thereafter, the learned Judge posed the issue whether the appellant murdered the deceased. He discussed this issue and at the end he found that the charge of murder was proved beyond reasonable doubt. Though under section 298 (2) of the CPA a trial judge is not bound by the opinion of the assessors, the practice is such that, in the event he

differs with such opinion, he has to assign reason for the difference. This is in accordance with the case of **Baland Singh v. R** [1954] 21 E.A.C.A 209 where it was held thus:

> *"In all cases where a trial judge comes to a contrary finding on facts to the unanimous opinion of the assessors it is a good practice for the judge to state in his judgment reasons for his disagreement.... Particularly if the assessors have given grounds of their opinion."*

In our present case, it is clear that the learned Judge did not assign reasons for his departure from the opinion of the assessors. That was an irregularity. However, from the authorities available, the same is not fatal. See for instance, the Court's decisions in the cases of **Tulisangeyeko Alfred and Two Others v. R,** Criminal Appeal No. 282 of 2006 and **Hamisi Mdushi v. R,** Criminal Appeal No. 161 of 2015 (both unreported).

Despite the foregoing, we raised *suo mottu* another issue as to whether the trial Judge properly summed-up the case to the assessors having observed that in his summing-up he made his opinion in respect of the evidence known to them. When Mr. Halifani was invited to comment on this issue, he submitted that the learned Judge did not

make his opinion known to the assessors. He argued that even if that was the case, it did not occasion injustice to the appellant because the assessors were not moved by the influence because they opined in favour of the appellant and further that, their opinion is not binding to the court. For his part, Mr, Magafu agreed that the Judge tried to influence the assessors during the summing-up.

We have considered this matter. Upon our perusal of the summing-up notes to the assessors, we are settled that, the trial Judge disclosed his own views in relation to the evidence which had the danger of influencing the assessors. For example, at page 93 of the record of appeal, the learned Judge said thus:

> *"On the very point whether or not the accused shot one in the back, through his cautioned statement* ***also we had evidence of the accused and the contradicting evidence of the doctor who conducted the postmortem examination.*** *On these two essential aspects I'm obliged to guide you that if you believed the accused's cautioned statement please opine.* ***There is a long-settled principle that the best witness is the accused who confesses****...."*

The learned Judge also stated at pages 93 to 94 thus:

> *"With regard to the issue how lethal was the weapon and the part of the body attacked* ***that one is self-explanatory."***
>
> [Emphasis added]

We are of the considered view that these directions amounted to the learned Judge expressing his own findings of fact on the evidence. It thus did not intend at getting the assessors opinions but to influence them which was contrary to law.

The Court met a situation akin to this in the case of **Ally Juma Mawepa v. R** [1993] TLR 231, where the trial Judge gave certain comments concerning the credibility of the appellant during summing-up to the assessors. It was held among other things that:

> *"(i) When summing up to the Assessors the Trial Judge should as far as possible desist from disclosing his own views, or making remarks or comments which might influence the Assessors one way or another in making up their own minds about the issue or issues being left with them for consideration;*
>
> *(ii) The assessors should be made to give their opinions independently, based on their own perception and*

understanding of the case after the summing up; the Judge makes his views known only after receiving the opinions of the assessors and in the course of considering his judgment in the case."

See also- **Hamisi Mdushi** (supra); **Kulwa Misangu v. R,** Criminal Appeal No. 171 of 2015; and **MT. 101296 Omary Mwichande & Three Others v. R,** Criminal Appeal No. 71 of 2016; and **Kinyota s/o Kabwe v. R,** Criminal Appeal No. 198 of 2017 (all unreported).

Following the authorities cited above, since in the present case the Judge disclosed his opinion to the assessors, we find that the proceedings of the trial court were vitiated. Now, because the finding on the point that we raised *suo mottu* is sufficient to dispose of the appeal, we find no need to consider the remaining grounds of appeal. Consequently, we invoke our revisional powers under section 4 (2) of the Appellate Jurisdiction Act [CAP 141 R.E. 2019], and hereby nullify the proceedings and the judgment of the High Court, quash the appellant's conviction and set aside the sentence.

Regarding the way forward, for the interest of justice, we hereby order the appellant's case be tried afresh by a different judge and a new

set of assessors. Meanwhile, the appellant shall remain in custody awaiting his fresh trial.

DATED at **MWANZA** this 2nd day of December, 2021

R. K. MKUYE
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

This Judgment delivered this 3rd day of December, 2021 in the presence of Ms. Rehema H. Mbuya, learned Senior State Attorney for the respondent / Republic and Mr. Majura Magagu, learned counsel for the appellant and Mr. Kadaraja Justin Holding brief for Miss Chaya Mlaki, learned counsel for the Appellant, is hereby certified as a true copy of the original.

F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL