IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

(CORAM: MWAMBEGELE, J.A., MWANDAMBO, J.A., And MASHAKA, J.A.)

CRIMINAL APPEAL NO. 98 OF 2019

1. FLORENCE S/O MOBILI
2. PASTORY S/O KAFINYE
3. SUKUMA S/O TOGWA ..... **APPELLANTS**
4. LAISON S/O SAIDIA
5. BUTIAMA S/O SIKUPENDA @ MWANISAWA

VERSUS

DPP ..... **RESPONDENT**

(Appeal from the Judgment of the High Court of Tanzania, at Sumbawanga)

(Mambi, J.)

dated the 5th day of April, 2019
in
Criminal Sessions Case No. 46 of 2016

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JUDGMENT OF THE COURT

26th November & 3rd December, 2021

MASHAKA, J.A.:

Before the High Court sitting at Sumbawanga, Florence Mobili, Pastory Kafinye, Sukuma Togwa, Laison Saidia and Butiama Sikupenda @ Mwanisawa, the appellants were convicted of two counts of murder contrary to section 196 of the Penal Code, Cap 16 of the Revised Edition 2002. It was alleged that on the 29th day of May 2015 at Mawenzusi village, within Sumbawanga District in the region of Rukwa, did murder Richard s/o

Mwanisawa and Yusuph s/o Richard @ Saidia. Upon conviction, they were sentenced to suffer death by hanging. Aggrieved, they lodged this appeal challenging the conviction and sentence.

The facts leading to this appeal go as follows. On the 28th May 2015, the first deceased Richard Mwanisawa told his son Agent Saidia (PW2), that Yusuph Richard @ Saidia, the second deceased was taken to the Village Executive Office accused of being a witch. The next day morning hours, the first deceased, his wife, Theresia Melimeli (PW1) and PW2 went to the office of the Village Executive Officer to see the second deceased. Upon arrival, they found the second deceased had been handed over to the clan members by the fourth appellant, the village chairman. Surprisingly, the clan members and other villagers forced the first and second deceased persons to show them where they kept the witchcraft.

Led by the fourth and fifth appellants together with a group of villagers forced the two deceased persons to show them where they were hiding the witchcraft, heading to the shamba that was suspected it was hidden. On the way, it was alleged that some people in the group of people including the first appellant, second appellant and third appellant, were in the same group. Along the way, some people including the second and fifth appellants

started to beat the second deceased person. When the first deceased tried to rescue him, they were all beaten up by the group of people.

The deceased persons were later forced to enter the house of the first deceased. It was alleged that upon entering the house, while inside, the appellants collected grass from the kitchen near the first deceased's house, and set the house on fire by a match box which was allegedly done by the fifth appellant, while the two deceased persons were inside and the house started burning. PW1 and PW2 claimed that they were near the place in a maize farm watching with fear while the appellants ran away. That is when PW1 and PW2 went to rescue the deceased persons, only to find the first deceased dead and the second deceased seriously burnt. Basil Justin PW3 (Ward Executive Officer) called the Police who, upon their arrival, found the first deceased already dead and the second deceased badly injured but still alive. He was rushed to the hospital instantly.

On the 31/05/2015, PW4 was assigned to investigate this incident. He went to the hospital and interviewed the second deceased who named the assailants, which led to the arrest of the first, second, third and fourth appellants. The fifth appellant was arrested a year later.

In their defence, the appellants denied to have committed the heinous act. The first, third and fifth appellants raised the defence of alibi. Eventually, the appellants were found guilty, convicted and sentenced as alluded to above.

Being aggrieved, each appellant lodged a separate memorandum of appeal. On the 23rd November, 2021, Mr. Mathias Budodi, learned advocate for the first, second, third and fourth appellants lodged a supplementary memorandum of appeal raising five grounds of appeal as follows: -

1. That the trial court proceedings are vitiated as there was no summing up to assessors as required in the law.
2. That the trial court proceedings are vitiated as the appellants were not properly accorded an opportunity to comment on the selection of assessors.
3. The trial court proceedings are vitiated as the defence counsel were not properly accorded chance to cross examine the prosecution witnesses in accordance with the law.
4. That the learned trial judge grossly erred in law for basing the conviction on evidence of mistaken and weak identification of the appellants.

5. That the findings of the trial learned judge are not supported and /or reflected with what transpired in the records of trial proceedings rather on extraneous matters.

When the appeal was called on for hearing, the appellants were present enjoying the services of Messrs. Baltazar Chambi and Mathias Budodi, learned Counsel. Ms. Scholastica Ansigar Lugongo, learned Senior State Attorney assisted by Ms. Safi Kashindi Amani, learned State Attorney represented the respondent Republic.

As Mr. Chambi for the appellants rose to address the Court, he prayed to join the fifth appellant to this appeal and the supplementary grounds of appeal. There was no objection from Ms. Lugongo and the Court acceded to the prayer.

Mr Chambi further intimated to the Court that they would argue only the five grounds of appeal in the supplementary memorandum of appeal replacing the memoranda of appeal lodged by each appellant.

Mr. Budodi who argued the appeal abandoned ground 3 and remained with grounds 1, 2, 4 and 5.

Submitting on the first ground of appeal, Mr. Budodi contended that there was no summing up to assessors by the trial judge as required by the

law, which had the effect of vitiating the trial court proceedings. Mr. Budodi argued that section 265 of Criminal Procedure Act, Cap 20 R.E 2002 (the CPA) requires that trials before the High Court to be with the aid of assessors who are required to give their opinion after the trial judge has explained the facts of the case and the legal principles to them. He referred us to the case of **Frednand Kamande and Five Others vs. The DPP**, Criminal Appeal No. 390 of 2017 (unreported), where the Court held that: -

> *"in order for the opinion from the assessors to be of significant value, the judge who is being aided by the assessors in compliance with section 265 should ensure that the facts of the case are will understood by the assessors and how they relate to the relevant laws. And, the facts as well as all points of law involved in the case have to be sufficiently and adequately made by the trial judge".*

He further contended that, at pages 107 – 117 of the record of appeal, the trial judge did sum up but failed to explain the vital points for consideration in the determination of the case before him. Referring to the judgment at page 137 of the record, he pointed out that the trial judge raised issues on circumstantial evidence and identification of the appellants being the basis of the conviction of the appellants, but in the summing up notes,

at page 116 of the record, the trial judge did not explain the two points to the assessors to enable them to give a proper opinion in the case.

Another complaint was that the summing up to the assessors was deficient in other aspects. Mr. Budodi argued that, the issue on defence of alibi raised by the appellants in the defence case was not explained to the assessors by the trial judge. Even the dying declaration (exhibit P4) which was the basis of conviction of the appellants was not explained by the trial judge to the assessors on its relevance. He concluded this ground that the trial was this conducted without the aid of assessors, which was a non-compliance with section 265 of the CPA, thereby vitiating the proceedings of the trial court. He urged the Court to find them to be a nullity and the judgment to be quashed and sentence set aside. He invited us to eventually set free the appellants.

On the second ground, Mr. Budodi contended that the appellants were not given the opportunity to comment on the selection of the assessors, reflected on page 78 of the record of appeal. He argued that in the selection of assessors, each appellant was required to be recorded individually on what they stated and not in a representative manner as reflected at page 78; as it is not ascertained that the appellants had no comments. He submitted that it was unprocedural and referred the case of **Frednand Kamande and Five**

Others vs. The DPP (supra), where the Court held that, the requirement to accord the accused opportunity to comment on the selection of assessors though not a rule of law, it is a well-established practice which had to be observed.

Advancing his arguments on the fourth ground, Mr. Budodi submitted that the identification of the appellants at the crime scene was weak and capable of mistaken identification which clearly shows that the prosecution failed to prove its case beyond reasonable doubt. He argued that the trial judge erred to ground conviction based on the evidence of PW1 and PW2; the key witnesses to the alleged murder as testified from pages 80 – 85 of the record. He amplified his submission that, the evidence was based on lies and referred us to the sketch map of the scene of crime (exhibit P2) that it does not reflect the location of the maize farm where PW1 and PW2 were allegedly hiding during the incident. He emphasized that the person who drew the sketch map never testified before the trial court and even the investigator who came to testify, failed to explain and provide clarification on the whereabouts and presence of the key witnesses during the burning of the house. Mr. Budodi contended that the maize farm was not reflected on the sketch map and concluded that the evidence of PW1 and PW2 was fabricated to implicate the appellants.

On the act of burning the house with the first and second deceased persons inside, he submitted that according to the dying declaration by the second deceased there were many people at the crime scene with no specific approximation. Mr. Budodi submitted on this ground that PW4 who recorded the dying declaration of the second deceased stated that he did not mention the second and third appellants. Referring us to the case of **Abraham Saigurani vs. Republic** [1981] TLR 265, he emphasized that though the evidence of PW1 and PW2 being blood relatives is credible, they had an interest of their own to serve. He implored the Court to treat the evidence of these two witnesses with caution before acting on it in the absence of corroboration from independent witnesses. He concluded his arguments on this ground that the identification of the appellants was too weak to eliminate chances of mistaken identity and thus, the prosecution failed to prove the case beyond reasonable doubt resulting into a finding that there is merit in this ground.

The final ground of appeal was a complaint on the extraneous matters introduced by the trial judge in his judgment. Mr. Budodi submitted that; the trial judge failed to consider the facts of the case and evidence adduced before the trial court. He argued that the findings of the learned trial judge at page 137 of the record of appeal stated that: -

> *"The evidence on the identification of the appellants by PW1 and PW2 was corroborated by the accused's cautioned statement and extra judicial statements, as the accused had voluntarily admitted to have committed the offence he stands charged".*

He strongly argued that there was no such evidence by way of cautioned statement and extrajudicial statement tendered during the trial.

Explaining further, Mr. Budodi drew our attention to page 136 of the record on the findings by the trial judge that all the assessors found that the appellants committed the offence of murder, while it was not correct. He referred us to page 117 of the record where only one assessor in his opinion stated that all the accused persons were guilty as charged. On the contrary, the learned advocate argued, it was not proper for the learned judge as he did at page 136 of the record to base his judgment on such extraneous matters. He referred to the case of **Frednand Kamande and Five Others Vs. the DPP** (supra). Mr. Budodi concluded that the trial judge failed to do justice to the appellants and for these reasons he urged the Court to find the proceedings and judgment are a nullity. On the way forward, he pegged the reason for so saying on the fact that the prosecution evidence was too

weak and if a retrial is ordered, the prosecution will go and fill in the gaps as the course which will be to the detriment of the appellants.

Ms. Amani, learned State Attorney conceded to grounds one and five of appeal, but did not support grounds two and four. She supported the conviction and sentence notwithstanding the ailments in the summing up notes and the introduction of extraneous matters in the judgment.

On the procedural defects raised in grounds one and five of appeal, she maintained that they were caused by the trial court and not the prosecution. However, she observed that there was enough evidence which proved the offence of murder against the appellants and there were no gaps or loopholes which would be filled by the prosecution in the likely event the Court orders a retrial. The learned Senior State Attorney thus proposed for a retrial of the appellants.

In her submissions, Ms. Amani commenced her submission with ground four. She submitted that the murder of the two deceased persons occurred in the morning at 11.00 am. She argued that according to the evidence of PW1 and PW2, the deceased were suspected of practicing witchcraft. She argued that during the movement of the deceased from the village office to the maize farm PW1 and PW2 were moving with the

appellants and identified them. She referred us to pages 79 – 85 of the record, showing that the identification of the appellants by PW1 and PW2 was watertight as they knew the culprits before the incident. Also, the heinous act was done during the day and the appellants were easily recognized, and therefore the conditions set in **Waziri Amani vs. Republic** [1980] TLR 250 at page 252 were met by the prosecution. She impressed on us that there was no mistaken identification of the appellants.

On the issue raised by the appellants for corroboration of the evidence of PW1 and PW2, she argued that the case referred to by learned counsel for the appellants was no longer good law and the ground of appeal was without merit because the trial court assessed the credibility of the key witnesses and did observe their demeanour and found to be credible. She referred the case of **Charles Kalungu & Another vs. the Republic**, Criminal Appeal No. 96 of 2015 (unreported) at page 5.

On the complaint concerning the dying declaration (exhibit P4) of the second deceased that he mentioned the name of Butiama, the fifth appellant to have been involved in the ordeal he went through, Ms. Amani agreed with the assertion by the second deceased that there were many people on that particular day of the incident.

Further, on the evidence of identification, Ms. Lugongo pressed upon us that the key witnesses were with the crowd of people since morning hours and the dying declaration mentioned the fifth appellant who was also identified by PW1 and PW2 together with the other appellants and thus there was no chance of mistaken identity.

In a brief rejoinder, Mr. Chambi maintained that the absence of the maize farm in the sketch map exhibit P2 showing the location of the said farm where PW1 and PW2 were allegedly hiding is a clear explanation that they were not at the scene of crime and could not have seen the unfolding event that day. He contended that the condition surrounding the incident could not allow the identification of the appellants, as PW1 was at one time said to have been beaten by the crowd and ran away. Under the circumstances, he argued, PW1 and PW2 were in a state of confusion and fear on what was happening to the deceased persons he argued.

On there being movement from morning until the time the act which led to the murder, Mr. Chambi contended that not everyone was present throughout the incident. He concluded that the identification of the appellants was not watertight to ground conviction warranting an order setting free the appellants instead of a retrial.

We have considered carefully the rival submissions by the learned counsel and Senior State Attorney and State Attorney for and against the appeal. It has been correctly pointed out by learned counsel for the appellants and conceded by learned Senior State Attorney that there was no proper summing up to assessors by the trial judge on vital points as required by the law. Section 265 of the CPA requires that all trials before the court shall be with the aid of assessors the number of whom shall be two or more as the court thinks fit. Also, it is the requirement of the law that a trial judge sitting with assessors is required to sum up to the assessors in terms of section 298(1) of the CPA before inviting their oral opinion. Section 298 (1) of the CPA provides that: -

> *"When the case on both sides is closed, the judge may sum up the whole evidence of the prosecution and defence and shall then require each of the assessors to state his opinion orally as to the case generally as to any specific question of fact adduced to him by the judge and record the opinion".*

The section imposes a mandatory responsibility on the trial judge to sum up the evidence. We have expounded this position in a number of cases including; **Mulokozi Anatory vs The Republic**, Criminal Appeal No. 124

of 2014 and **Omari Khalfan vs. Republic**, Criminal Appeal No. 107 of 2015 (both unreported), to mention a few.

It is trite that in the summing up, the trial judge has the duty to explain all the vital points of law for example; explain what is murder, the essential elements of the offence of murder, make reference to the duty of the prosecution to prove the offence charged beyond reasonable doubt, elaborate on the cause of death, credibility of witnesses, the accused's defence and any other relevant point to the case including the relevance of a dying declaration as it were in this appeal.

Now coming back to the appeal before us, there is no doubt that the learned trial judge, as clearly shown at pages 107 to 117 of the record of appeal, did sum up to the assessors. As we alluded to earlier, the sole purpose of summing up to the assessors is to enable them to give informed opinion as required by section 298 (1) of the CPA. See **John Mlay vs. Republic,** Criminal Appeal No. 216 of 2007 (unreported). However, the summing up notes reflected in the record of appeal falls short of that relevant aspect. The trial judge failed to explain the vital legal points such as the ingredients of the offence, malice aforethought and where it is not proved the offence changes to manslaughter, conditions favouring identification, the defence of alibi, applicability and relevance of the dying declaration and the

principle of the last person to be seen with the deceased which were the basis of conviction of the appellants. Actually, what the trial judge did in his summing up notes was simply to mention some principles as reflected at page 109 of the record and proceeded to summarize the evidence of the prosecution and the defence witnesses. Then the trial judge invited the assessors to address the following issues that is; whether the prosecution proved the case beyond reasonable doubt, whether the accused persons committed the offence which they stood charged with and the assessors were told that they were at liberty to raise more issues if they wished. The trial judge went further and stated that: "*You are at liberty provided at the end of your opinion you should state whether or not the accused person is guilty.*"

Clearly in the instant case, we are in agreement with the learned counsel for the appellants and Ms. Lugongo that the summing up by the learned trial judge to the assessors was irregular and fatal with the effect of nullifying the entire trial proceedings.

As canvassed above, the non-direction and failure of the trial judge to prepare a proper summing up to the assessors amounted to the trial of the appellants being conducted without the aid of assessors as envisaged under section 265 of the CPA and hence fatal vitiating the entire trial proceedings.

In **Japhet Kalanga vs. The Republic**, Criminal Appeal No. 332 of 2016, **The Republic vs. Grosphery Ntagalinda @ Koro,** Criminal Appeal No. 73 of 2014, **Ntobangi Kelya and Ngisa Mahila vs. The Republic**, Criminal Appeal No. 234 of 2015, **Hamis Basil vs. The Republic,** Criminal Appeal No. 165 of 2017 (all unreported), the Court emphasized that failure to address and direct assessors on the vital points of law renders the proceedings a nullity.

Consequently, the first ground is meritorious and we allow it.

Ground 2 of appeal need not detain us. The complaint is that the appellants were not accorded opportunity to comment on the selection of assessors. Mr. Budodi argued that according to the record at page 78, it is not clearly known if each appellant had no comment as it was recorded in a representative manner, hence unprocedural, referring us to **Frednand Kamande and Five Others** (supra) that the appellants were denied the opportunity in the selection of assessors and that it vitiates the proceedings and judgment.

From our examination of the record showing that the appellants were given opportunity to express their views and responded in unison to have no objection, we see no valid basis in this complaint and reject it. In our view,

the irregularity was not so fundamental and incurable to affect the trial as contended by the appellant's' learned advocate. It was an irregularity which was curable by section 388 of the CPA. Ground two is thus dismissed

The fourth ground hinges on whether there was positive identification of the appellants considering the circumstances surrounding the incident. The factors for a proper identification were laid down in **Waziri Amani vs. The Republic** (*supra*) followed by many cases including in **Marwa Wangiti Mwita and Another vs. Republic** [2002] T.L.R. 39, **Ally Manono vs. Republic,** Criminal Appeal No. 242 of 2007, **Jamila Mfaume Makandila @ Mama Warda,** Criminal Appeal No. 383 of 2016 (unreported). In **Waziri Amani vs. The Republic** *(supra)* we held that: -

> *"The following factors have to be taken into consideration, the time the witness had the accused under observation, the distance at which he observed him, the condition in which such observation occurred, for instance whether it was day or night (whether it was dark, if so was there moonlight or hurricane lamp etc.) whether the witness knew or has seen the accused before or not".*

In the instant appeal, the incidence took place at around 11:00 am in broad day light and there was no point of assessing the source of light and

its intensity. On the issue of distance, PW1 stated at page 80 of the record that she was close hiding in a maize farm watching what was happening though she could not provide an estimation on how close, while at page 84 PW2 stated that he was with PW1 closely watching in fear. However, it was contended by the learned counsel for the appellants that the sketch map exhibit P2 did not show any maize farm near the crime scene. They maintained that the absence of the maize farm in exhibit P2 where PW1 and PW2 were allegedly hiding is a clear explanation that they were not at the scene of crime and could not have seen the unfolding events that day. It is also true that the circumstances surrounding the scene of crime could not allow the identification of the appellants as at page 81 of the record, PW1 was at one time beaten by the crowd and had to run away.

Under the circumstances and considering the state of confusion PW1 and PW2 were in, and fear on what was happening the deceased persons would have interfered and obstructed the identification of the appellants as PW2 stated that there were many people that day. We thus sustain the submission by learned counsel that there was reasonable doubt whether PW1 and PW2 were actually close to the crime scene and witnessed the incident. As a matter of law, the doubts should be resolved in favour of the appellants. Ground four is merited and allowed.

The fifth ground concerns a complaint that the findings of the trial court in its judgment was based on extraneous matters. At pages 137 and 144 of the record of appeal, the learned trial judge stated that the incident occurred at night while all the prosecution witnesses particularly PW1 and PW2 stated that the incident occurred at around 11:00 am. Also at page 137, the trial judge stated that the evidence was corroborated by the accused's cautioned statement and extra judicial statement while none of the prosecution witnesses tendered the said cautioned statement nor the extrajudicial statement.

In addition, the findings by the trial judge that all the assessors returned a verdict of guilty of the offence of murder is not borne out of the evidence. It is clear from page 117 of the record, only one assessor opined that all the accused persons were guilty as charged while at page 136 of the record, the trial judge stated that *"the assessors had the view that all accused are responsible of murder as charged due to the clear evidence produced by the prosecution..."*.

For that reason, the learned trial judge made his findings on extraneous matters which were not part of the proceedings and testimonies of the prosecution witnesses. This also vitiates proceedings and consequently the judgment of the trial court consistent with our decision in

Shija Sosoma vs. The D.P.P, Criminal Appeal No. 327 of 2017 (unreported).

On the way forward, though Mr. Budodi and Ms. Lugongo urged us to nullify the proceedings of the trial court, they differed on the way forward. Mr. Budodi urged the Court to set the appellants free as a retrial will not be in the interest of justice on account of the gaps in the evidence of the prosecution falls short of proof of the case beyond reasonable doubt and that a retrial would avail an opportunity to fill in the gaps. Ms. Lugongo pressed us for a retrial stating that the prosecution case was not shaky. We have carefully considered and weighed out the rival submissions in the light of the evidence of the case. There is no dispute that this case stood or fell on the evidence of identification by recognition. The conditions obtaining at the crime scene did not allow easy identification. If anything, the probabilities of mistaken identity in the circumstances of the case, were not eliminated. All these considered, we are settled that it will be in the interest of justice to nullify the proceedings and set the appellants free.

Consequently, due to the wanting of summing up notes to the assessors and introduction of extraneous matters being injected in the judgment, we nullify the entire proceedings of the trial court, quash the judgment and the conviction and set aside the sentence imposed on the

appellants. For the reasons we have stated, we refrain from ordering a retrial, and, instead, we order that the appellants be released forthwith from custody unless they are detained for some other lawful cause.

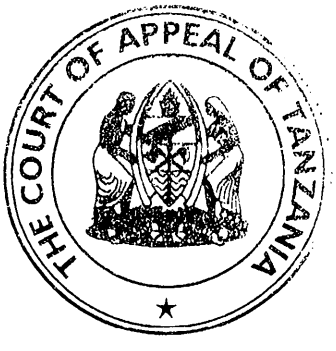
DATED at **MBEYA** this 3rd day of December, 2021.

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

The Judgment delivered this 3rd day of December, 2021 in the presence of the appellants, in person and Ms. Zena James learned State Attorney for the respondent/Republic is hereby certified as a true copy of the original.



D. R. Lyimo
DEPUTY REGISTRAR
COURT OF APPEAL