IN THE COURT OF APPEAL OF TANZANIA
AT MBEYA

(CORAM: LILA, J.A., KOROSSO, J.A. And MWANDAMBO, J.A.)

CRIMINAL APPEAL NO. 222 OF 2018

JOSEPH S/O SHEGEMBE ..... APPELLANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS ..... RESPONDENT

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

(Mambi, J.)

dated the 18th day of October, 2018
in
Criminal Appeal No. 52 of 2016

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JUDGMENT OF THE COURT

16th & 25th February, 2021

LILA, J.A.:

The Appellant was charged of murder contrary to section 196 of the Penal Code [Cap 16 R.E 2002] before the High Court of Tanzania sitting at Mpanda. He was accused of murdering his sister one Kashinje Shegembe. The information alleged that on 31st July, 2014 at Kanindi C village within Mlele District in Katavi Region, the appellant did murder his sister one Kashinje d/o Sheghembe. Upon being convicted, he was sentenced to suffer death by hanging. He is challenging both the conviction and sentence in this appeal.

The brief facts of the case as can be gathered from the record of appeal are as follows: on the fateful night, Veronica Iyela (PW1) and the deceased slept in the same house. Sometimes late in the night, PW1 learned that the deceased who happened to be her mother was lying dead on a pool of blood. She noted that she was cut with a bush knife. She informed her mother's sister one Neema Bahati (PW2) who went and satisfied herself that the deceased was dead and was cut with a bush knife. One Mashaka Iyela (PW3) also went to the deceased's house and, like PW2, found the deceased dead. The appellant also turned up at the scene as one of the mourners. However, his trouser which appeared with blood stains attracted other mourners' attention and was thus suspected. He was arrested. Upon being queried, he admitted killing his sister because he was told by a traditional healer that she was bewitching him. The matter was reported to the police. He maintained his confession before Inspector Pascal Mashauri who turned up at the scene. His cautioned statement was recorded by E. 1351 DC Jeremia in which he confessed committing the offence. He was later taken to one Peter C. Mseluka, a Ward Executive officer (WEO) and justice of the peace, before whom he also confessed. The cautioned and extra-judicial statements were admitted as exhibits P3 and P4, respectively. In both statements, the appellant admitted to have

killed his sister (the deceased) because he went to a witch doctor who told him that the deceased was bewitching him.

In his defence, the appellant evasively denied to commit the offence and stated that he was told that his sister was killed and he therefore went to the scene of the crime and stayed for the whole night. In the morning, he was arrested, beaten and interrogated regarding the incident of murder.

At the end of the trial, the appellant was found guilty and convicted. Upon conviction he was sentenced to suffer death by hanging.

Being aggrieved, he preferred this appeal. He lodged a memorandum of appeal comprising five (5) grounds of appeal which was subsequently followed by a supplementary memorandum of appeal comprising three (3) grounds. For reason soon to be disclosed, we don't see the need to recite the grounds of appeal. Suffice it to say that, Mr. Mushokorwa who advocated for the appellant before us informed the Court that he had agreed with the appellant that the memorandum of appeal filed by the appellant be abandoned and the appeal be determined upon the grounds comprised in the supplementary memorandum of appeal.

At the hearing of the appeal, the appellant entered appearance through video facilities and was linked from Ruanda prison. The respondent was represented by Mr. Raschal Marungu, learned Senior State Attorney and Mr. John Kabengula, learned State Attorney.

At the inception of the hearing of the appeal, Mr. Kabengula, in terms of Rule 4(2)(a) and (b) of the Tanzania Court of Appeal Rules, 2009, sought leave of the Court to bring to the attention of the Court some salient procedural infractions committed by the trial court which vitiated the entire proceedings and judgment. To him, if the shortcomings are successfully considered by the Court, consideration of the grounds of complaints comprised in the supplementary becomes unnecessary. There being no opposition from Mr. Mushokorwa, we granted him leave to highlight the procedural flaws.

The learned State Attorney commenced his submission by taking issue with the failure by the trial court to afford the appellant an opportunity to express whether or not he objected to the selected assessors or any of them to participate in the trial. Making reference to page 4 of the proceedings, he submitted that after the appellant was reminded the charge he was facing and denying the same, there is no indication that he was afforded the opportunity to comment on the selected assessors. According to him, it is questionable whether the appellant exercised his right to comment on the assessors selected and if not, it means that he did not receive a fair trial.

Addressing us on the second anomaly he had noted, Mr. Kabengula criticized the trial court for not addressing the gentlemen assessors on the

vital points of facts and law involved in the trial for them to give a rational and focused opinion. The summing up was insufficient, he stressed. As the appellant's conviction was, according to the trial court's judgment, founded on circumstantial evidence, it was incumbent upon the presiding judge to explain in details what circumstantial evidence entailed and its application in determining the accused's guilty, the learned State Attorney submitted. He argued that failure to do so denied the assessors knowledge on that legal concept hence they could not give a focused and rational opinion. He submitted that the omission violated the provisions of section 265 of the Criminal Procedure Act, Cap. 20 R. E. 2002 (the CPA) which imperatively require all trials before the High Court should be with the aid of assessors. He urged the Court to find that the trial was not with the aid of assessors. To fortify his submission on the highlighted infractions, he referred us to the Court's unreported decision in the case of **Yustine Robert vs Republic**, Criminal Appeal No. 329 of 2017. In sum, he submitted that the outlined flaws vitiated the trial rendering the proceedings and judgment of the trial court a nullity. He accordingly urged the Court to invoke its powers of revision in terms of section 4(2) of the Appellate Jurisdiction Act, Cap. 141 R. E. 2019 (the AJA) and nullify all the proceedings, quash the judgment and set aside the sentence.

On the way forward, the learned State Attorney was of the strong view that this is a fit case to order a re-trial. He pointed out that the appellant was arrested after being found wearing a blood stained trouser, upon arrest he confessed killing the deceased before the public and WEO and later repeated the same in both the cautioned and extra-judicial statements. More seriously, the learned State Attorney contended, he led people to the discovery of the bush knife used in the killing. He was convinced based on such evidence, that the prosecution has a strong case against the appellant. To bolster his arguments, he referred the Court to the case of **Posolo Wilson Mwalyego vs Republic**, Criminal Appeal No. 613 of 2015 (unreported).

On his part, Mr. Mushokorwa basically joined hands with all that was submitted by the learned State Attorney save for the way forward for which he parted ways with the learned State Attorney. He was insistent that an order for retrial will work injustice on the part of the appellant, for that will allow opportunity to the prosecution to fill up the yawning gaps apparent in their case. Elaborating, he argued that the alleged blood stained trouser and bush knife which are crucial in the determination of the appellant's guilt were not tendered in trial court court as exhibits. If retrial order is made, he argued, the prosecution will fill the gap by tendering them. He cited to us the case of **Emanuel Saguda @ Sulukuka and**

Another vs Republic, Criminal Appeal No. 422 of 2013 (unreported). He was also suspicious that even the cautioned and extra-judicial statements which appear to be faulty may be altered by the prosecution. All these reasons taken together and considered coupled with the fact that the appellant has already languished behind bars for quite a long time, Mr. Mushokorwa argued, justify the making of an order releasing the appellant from prison.

We have anxiously considered the learned arguments by counsel from either side. They are agreed that selection of assessors and summing up notes to assessors are problematic and the ensuing outcomes. They have locked horns only on whether or not we should order a retrial.

Without any hesitation, we are inclined to agree with the concurring submissions by the learned counsel that the anomalies pointed out obtained during the trial and the record are vivid.

In elaboration, we propose to first consider the complaint relating to omission by the trial court to afford the appellant an opportunity to express whether or not he objects to the selected assessors. The record bears out that mishap at pages 4 and 5. After the appellant had been reminded of the charge and had maintained his plea of not guilty, the trial ensued with the three selected assessors without the appellant being asked whether or not he objects to any of them. Our starting point is section 265 of the CPA

which imperatively requires all trials before the High court be conducted with aid of assessors. It states that:-

> *"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 light of the above stated position, the High Court is enjoined to ensure that assessors are appointed and they attend during the whole trial. Admittedly, there was no express provision in our Criminal Procedure Act, Cap. 20 R. E. 2002 (the CPA) requiring the accused be accorded an opportunity to comment on the selected assessors, hence it is not a rule of law. But the rational of that was meticulously propounded in the unreported Criminal Appeal No. 176 of 1993 - **Laurent Salu and Five Others vs. The Republic,** cited in **Chacha Matiko @ Magige vs Republic**, Criminal Appeal No. 562 of 2015 (unreported) that:-

> *"Admittedly the requirement to give the accused the opportunity to say whether or not he objects to any of the assessors is not a rule of law. It is a rule of practice which, however, is now well established and accepted as part of the procedure in the proper administration of criminal justice in this country. The rationale for that rule is fairly apparent. The rule is designed to ensure that the accused person has a fair hearing. For instance, the accused person in a given case may have a good reason for thinking that a certain assessor may not deal with his*

case fairly and justly because of, say, a grudge, misunderstanding, dispute or other personal differences that exist between him and the assessor. In such circumstances in order to ensure impartiality and fair play it is imperative that the particular assessor does not proceed to hear the case; if he does then, in the eyes of the accused person at least, justice will not be seen to be done. But the accused person, being layman in the majority of cases, may not know of his right to object to an assessor. Thus in order to ensure a fair trial and to make the accused person have confidence that he is having a fair trial, it is of vital importance that he is informed of the existence of this right. The duty to so inform him is on the trial judge, but if the judge overlooks this, counsel who are the officers of the court have equally a duty to remind him of it.

In the instant case, it is not known if any of the accused persons had any objection to any of the assessors, and to the extent that they were not given opportunity to exercise that right, that clearly amounts to an irregularity."

It is, indeed, obvious in our present case that the record is silent on whether or not the appellant was accorded an opportunity to exercise his right to comment on the suitability of the appointed assessors to participate in the case. We cannot, with certainty, be sure what would have been the appellant's response with regard to the appointed assessors or

any of them had the trial judge afforded the appellant the opportunity to express his opinion. It was upon the trial judge to ensure that the appellant himself exercised that right. That omission, certainly, denied the appellant the right to ensure that his case was tried by a fair and impartial court. The appellant was accordingly unfairly tried with the effect that it occasioned a failure of justice.

We now turn to consider the complaint in respect of inadequate summing up notes to the assessors. Upon our serious perusal of the record of appeal, we entirely agree with learned counsel for the parties that the appellant's conviction was founded on circumstantial evidence. Neither of the prosecution witnesses claimed to have seen the appellant commit the offence charged. His arrest was necessitated by his being found wearing a blood stained trouser before he later on confessed committing the offence and led to the recovery of the blood stained bush knife.

We need not overemphasize that the role of assessors in criminal trials is to assist the High Court in the dispensation of justice. Although they are not learned on matters of law, through the opinions they give, they assist the court to arrive at a just decision. In discharging that duty their duty is two-fold. One; is by putting up questions to witnesses in terms of section 177 of the Tanzania Evidence Act, Cap. 6 R. E. 2002. Through that process they assist the court to explore the truth. Two; is by giving

their respective opinions after the summing up notes are read out to them by the presiding judge at the closure of cases by both sides. This is done in terms of section 298(1) of the CPA. For easy reference, that section reads:-

> *"298.-(1) when the case for both sides is closed, the judge may sum up the evidence and shall then require each of the assessors to state his opinion orally as to the case generally and as to specific question of fact addressed to him by the judge, and record the opinion."*

Although the word used is "may" which may be interpreted not to be mandatory, it is long established that it is good practice and augurs well with the spirit behind the provisions of section 265 of the CPA. [See **Hatibu Ghandhi and Others vs R**, [1996] TLR 12 and **Khamisi Nassoro Shomari vs SMZ** [2005] TLR 228 cited in **Bernadeta Bura @ Lulu vs Republic**, Criminal Appeal No. 530 of 2015 (unreported)]. That stance was also explicitly stated by the Court in the case of **Mulokozi Anatory vs Republic**, Criminal Appeal No. 124 of 2014 (unreported) where it was held that:-

> *"...we wish first to say in passing that though the word "may" is used implying it is not mandatory for the trial judge to sum up the case to the assessors but as a matter of long established practice and to give effect to s. 265 of the Criminal Procedure Act that all trials before the High Court shall be with the*

aid of assessors, trial judges sitting with assessors have invariably been summing up the cases to assessors..."

In the instant case, we entirely agree with the concurrent views of the learned counsel of the parties that the course taken by the learned trial judge was faulty.

The purpose of summing up to assessors is to enable the assessors arrive at a correct opinion. It is incumbent on the trial judge, in a summing up the case to the assessors, to explain fully the facts of the case before them in relation to the relevant law. The learned judge has to properly direct the assessors on vital points of law for them to give a focused opinion. The Court has consistently held that non-direction or misdirection of assessors on vital points of law vitiates a trial.[See **Tulubuzya Bituro vs R** [1982] TLR 264, **Jesinala Malamula vs R** [1993], **Maweda Mashauri Majenga @ Simon vs Republic**, Criminal Appeal No. 292 of 2014 (unreported)]. In, for instance, the case of **Tulubuzya Bituro vs Republic** (supra) the Court stated 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 non-direction to the assessors on a vital point..."

In yet another case of **Abdallah Bazaniye and Others vs Republic** [1990] TLR 42, the Court stated that:-

"...We think that the assessor's full involvement as explained above is an essential part of the process that its omission is fatal, and renders the trial a nullity."

[See also **Said Mshangama @ Senga vs Republic**, Criminal Appeal No. 8 of 2014 (unreported)].

It is evident at pages 104 to 105 of the record that the trial court relied on circumstantial evidence to arrive at the conclusion that the appellant was responsible in killing the deceased. Unfortunately though, such vital point of law was not brought to the attention of the assessors in the summing up notes. It is plain that the trial judge, in the summing up notes touched on the burden of proof that it lies on the prosecution and confessions and what they entail. Apart from the mere mention that an offence can be established by circumstantial evidence at page 55 and 62 of the record no elaboration was given as to how it is applied and the consequences thereof. As a result, the opinions of assessors given at pages 66 and 67 had no any bearing on how they applied the circumstantial evidence to arrive at the unanimous verdict of guilt. It cannot therefore be

said that the trial was with the aid of assessors. We therefore accept that nullification of the entire proceedings of the trial court is unavoidable.

We are left with the issue whether or not we should order a retrial. The factors to be considered in that exercise were with precision set out in the often cited decision by the defunct East African Court of Appeal of **Fatehali Manji vs Republic** [1966] E. A. 341. In that case it was stated that:-

> *"In general a retrial will be ordered only when the original trial was illegal or defective. It will not be ordered where conviction is set aside because of insufficiency or for purposes of enabling the prosecution to fill up gaps in its evidence at the first trial. Even where the conviction is vitiated by mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that, a retrial shall be ordered; each case must depend on its own facts and circumstances and an order of retrial should only be made when the interest of justice require."*

The principles stated in the above decision were followed by the Court in the case of **Selina Yambi and Others vs Republic**, Criminal Appeal No. 94 of 2013 (unreported) in which the Court stated:-

> *"We are alive to the principle governing retrials. Generally a retrial will be ordered if the original trial*

is illegal or defective. It will not be ordered because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps. The bottom line is that, an order should only be made where the interest of justice require."

We have dispassionately pondered over the learned contending arguments by the counsel and examined the record. The appellant was charged with a capital offence of murder which attracts a sentence of death to the convicted person. As we have shown above, the appellant's conviction was founded on circumstantial evidence that he was found wearing a blood stained trouser and the confessional statements made by the appellant before the public, WEO, police and justice of the peace. In addition, the appellant was said to have had led a team of people to the recovery of the blood stained bush knife. In defence, the appellant denied responsibility and claimed to have been beaten by the public. We have also examined the cross-examination made by either side and realised that it was a fairly contested trial. We also agree with Mr. Mushokorwa that the alleged blood stained trouser and bush knife were not tendered as exhibits. We also take note that the extra-judicial statement was recorded by the WEO for which Mr. Mushokorwa claimed to have been improperly recorded which is a matter to be determined by the trial judge. That notwithstanding, the remaining oral evidence by the prosecution witnesses

appears to be solid and is inconsistent with Mr. Mushokorwa's worries that an order for retrial will afford opportunity the prosecution to fill up gaps. In all fairness, we think this is a fit case to order a retrial.

In the event, we exercise our revisional powers under section 4(2) of the AJA and hereby nullify all the proceedings of the trial court, quash the conviction and set aside the sentence of death by hanging meted by the trial court. We order a retrial before another judge with a different set of assessors. Given a relatively long period the appellant has languished in prison, we direct the trial to be expedited.

DATED at **MBEYA** this 24th day of February, 2021.

S. A. LILA
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

The judgment delivered this 25th day of February, 2021 in the presence of Mr. Justinian Mushokorwa, counsel for the Appellant and Mr. Baraka Mgaya, learned State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.

G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL