IN THE COURT OF APPEAL OF TANZANIA

AT IRINGA

(CORAM: LILA, J.A., KITUSI., J.A. And MWAMPASHI., J.A.)

CRIMINAL APPEAL NO. 567 OF 2019

BATRAM NKWERA @ MHESA.....APPELLANT

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS ..... RESPONDENT

[Appeal from decision of the Resident Magistrate's Court of Ruvuma at Songea with Extended Jurisdiction]

[Malewo PRM (Ext. Jur.)]

dated the 22nd day of November, 2019

in

RM. Criminal Session No. 11 of 2019

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JUDGMENT OF THE COURT

16th & 24th March, 2022

LILA, J.A.:

The appellant, **BATRAM NKWERA @ MHESA**, was charged with and convicted of the offence of murder, contrary to section 196 of the Penal Code, Cap. 16 R. E. 2002 (now R. E. 2019) in RM Criminal Sessions Case No. 11 of 2019. The Principal Resident Magistrate (Extended Jurisdiction) who tried the case (Malewo, PRM) sentenced him to suffer death by hanging. The particulars on the information alleged that on 2/4/2018, at Ntunduwalo village within Mbinga District in Ruvuma Region, the appellant murdered one Bathoromeo Benedict Nkwera (the deceased).

Upon the appellant denying the accusation, the prosecution lined up seven (7) witnesses and tendered two documentary exhibits namely; a Postmortem Report (exhibit P1) and a PF3 (exhibit P2). The evidence was to this effect. The appellant was a grandson of the deceased and were in good terms all the time. On the fateful date at about 04:00pm, Wema Mapunda (PW1) was at the deceased house taking food. Meanwhile, the deceased was inside his room sleeping. Suddenly, the appellant appeared carrying with him a bush knife and a stick and requested PW1 to call the deceased. He entered the house and beat the deceased on various parts of his body mainly on the head and back bone. PW1 heard the deceased complaining why the appellant was beating him and the appellant was asking the deceased if he did not know what he had done. Having noted that, PW1 rushed to call Emakulata Mahundi (PW2) and upon their return they saw the appellant pulling the deceased outside the house while beating him and telling the deceased to follow him up to where there was a burial ceremony of the appellant's brother one Lazaro Nkwera. Worried about the aftermath of beatings on the deceased by the appellant, PW2 ran to report the matter to her mother who was in the burial ceremony but on the way he met Digna Batholomeo Nkwera (PW4), Papias Edmund Nditi (PW3) and the deceased who was severely beaten. PW3 took the deceased to

Ruanda hospital where he passed away while being treated. The appellant was arrested and locked in the Village Office but was forcefully released by a group of villagers and he disappeared. The matter was then reported to the police and the appellant was arrested at Lituhi in Nyasa District on 4/4/2018. An autopsy was conducted by Noel Menas Millinga (PW6), Assistant Medical Officer, and it was revealed that the cause of the death was intracranial bleeding due to head injury a finding which was posted on a Postmortem Report (exhibit P1). To clear the appellant's mental status, he was subjected to medical examination at Mbinga District Hospital and Dr. Stephano Chanangula (PW7) made a finding that he was mentally fit and he posted the finding on a PF3 (exhibit P2).

While the prosecution version was aimed at establishing that the appellant killed the deceased and the killing was with malice aforethought, the appellant's defence was that he is not responsible and the killing was perpetrated by a group of other people while he was busy with burial activities.

At the height of the evidence by both sides, the learned trial Resident Magistrate summed up the case to the three assessors who

participated throughout in the trial who, unanimously, returned a verdict of guilty.

The learned trial Resident Magistrate shared the conclusion by the assessors that the appellant was responsible for the death of the deceased and the same was premeditated, that is to say with malice aforethought and convicted the appellant of murder.

The appellant was aggrieved. He preferred the present appeal fronting seven (7) grounds of appeal. However, at the hearing of the appeal, Mr. Jally Willy Mongo, learned advocate, who represented him, sought leave of the Court to argue a ground of appeal other than those earlier specified in the memorandum of appeal in terms of Rule 81(1) of the Tanzania Court of Appeal Rules, 2019 which prayer was not resisted by Ms. Hellen Chuma, learned State Attorney, who represented the respondent, the Director of Public Prosecutions. We granted him leave to argue that ground which goes thus: -

> *"The trial against the appellant was not properly conducted as the gentlemen assessors were not properly involved by the learned PRM (Extended Jurisdiction)"*

Fortunately, learned counsel of the parties were inclined that the appeal turns and is wholly disposable under this ground of appeal and, accordingly, we asked them to address us on it only.

Elaborating on the point, Mr. Mongo submitted that the complaint is two-limbed; one, failure by the court to direct the assessors on vital points of law and, two, failure to advise the assessors of their roles in the trial.

Addressing us on the first limb, the learned advocate contended that the provisions of section 265 of the Criminal Procedure Act, Cap. 20 R. E. 2002 (now R. E. 2019) (the CPA), imperatively require all criminal trials to be conducted with the aid of assessors and one way of involving them is by giving their opinions on verdict of the case after the conclusion of the case by both sides. For them to have an effective opinion, the trial judge or Resident Magistrate (Extended Jurisdiction), has to sum up the case to them in terms of section 298(1) of the CPA wherein he has to, not only give a summary of the facts of the case, but also direct them on the facts in relation to the law. Failure to do so renders the trial a nullity. In bolstering his assertion, he referred us to the Court's decision in **Shadida Issa @ Rasta and Another v. Republic**, Criminal Appeal No. 125 of 2019. Substantiating his

assertion, he argued that in the present case the learned trial magistrate at page 47 of the record simply mentioned that the determination of the case rested on the issue of identification and circumstantial evidence without sufficiently elaborating what they entail and, in his judgment, he not only discussed them in detail but also, they grounded the appellant's conviction as he was satisfied and held that the appellant was properly identified at the scene of crime. The assessors were not properly directed hence they did not give focused opinions, he concluded.

Elaborating the second limb, Mr. Mongo had brief but focused submission that the record of appeal at page 8 is vivid that three assessors were appointed to assist the learned Resident Magistrate in the appellant's trial which began at page 10 by recording the witnesses' testimonies. He contended that the trial, after election of the assessors, was not preceded by the trial magistrate relating to the assessors their role during the trial as a result of which they did not effectively participate in the trial. For those two reasons, he implored upon us to hold that the trial was not with the aid of assessors and nullify the whole trial. As for the way forward, he was not hesitant to urge the Court to make an order for retrial before another Magistrate (Extended Jurisdiction) and a new set of assessors.

Ms. Chuma, in reply, did not quite contest the arguments by Mr. Mongo. While avoiding the risk of making a repetition, she intimated to the Court that she was in all fours with the arguments and conclusion arrived at by the learned advocate and stressed that the infraction is fundamental and vitiated the whole trial as a result of which the trial should be nullified.

In our deliberations we wish to start with the second limb of the issue raised by Mr. Mongo. Even going by the record, it was the first infraction to be committed. The record bears out that the trial court exercised its mandate under section 283 of the CPA to appoint three assessors to preside over the case along with the learned Principal Resident Magistrate (Extended Jurisdiction). As is a long-established practice, the accused was accorded opportunity to comment on their suitability to participate in the trial and he expressed his non-objection to all of them. Then, trial began by calling witnesses and recording their respective testimonies. It is the learned brains' view that to ensure full participation of assessors as envisaged under section 265 of the CPA, the assessors ought to have been informed of their role during the trial before the trial began. To have a clear picture of the import of that

section, as it was when the appellant was tried, we hereunder quote it thus:

> *"265. All trials before the High Court should be with aid of assessors, the number of whom shall be two or more as the court thinks fit".*

The wording of the above section, in very unambiguous terms, made it clear that the role of assessors is to assist the court to arrive at a just decision. That purpose is achieved when they put up questions for clarification as mandated under section 177 of the Evidence Act, Cap 6 R. E. 2002 (Now R. E. 2019) or in stating their opinions in terms of section 298(1) of the CPA [see **Kulwa Misangu v. Republic**, Criminal Appeal No. 171 of 2015 (unreported)]. Questions put up to witnesses assist to unveil the otherwise withheld information which may be crucial in the just determination of the case. Likewise, the opinions by assessors at the conclusion of the trial assist the judge in the deliberation of both legal and factual issues arising from the case. To this end and to have an effective participation, the need to bring to the knowledge or understanding of the role they (assessors) have to play during trial is not debatable. That is what we insisted in the case of **Hilda Innocent v. Republic**, Criminal Appeal No. 181 of 2017 which was cited in **Galula Nkuba @ Malago and Another v. The Director of Public**

Prosecutions, Criminal Appeal No. 394 of 2018 (Both unreported) where we stated that: -

> *"... although informing the assessors on their role and responsibility is a rule of practice and not a rule of law, as it is for a long time an established and accepted practice in order to ensure their meaningful participation, a trial judge must perform this task immediately after ascertaining that there is no any objection against any of the assessors by the accused before commencing the trial. It is also a sound practice that a trial judge has to show in the record that this task has been fully performed. For even logic dictates that whenever a person is called upon to assist in performing any task or to offer any service, he must be fully informed of what is expected of him in performing that task. Thus, failure to inform assessors on their role and responsibility in the trial diminishes their level of participation and renders their participation which is a requirement of the law meaningless".*

Given its significance, there is an unbroken chain of this Court's decisions adjudging that failure to or making an omission to relate to the assessors the role they have to perform during the trial, seriously impairs their participation. The trial turns out to be not with the aid of

assessors as imperatively required under section 265 of the CPA. The violation, therefore, renders the trial a nullity. (See **Said Mshangama Asenga v. Republic**, Criminal Appeal No. 8 of 2014, **Abdallah Juma @ Bupale v. R,** Criminal Appeal No. 537 of 2017 and **Laurent Salu and Five Others v. Republic,** Criminal appeal No. 176 of 1993 (All unreported). In the last case the Court underscored the duties of trial judges in a trial with the aid of assessors including the duty to explain to assessors their roles and responsibilities in the trial.

This takes us back to the first limb of the issue raised by Mr. Mongo. As shown above, it relates to summing up to assessors. The learned advocate contended and, rightly so in our view, that the learned trial magistrate did not address the assessors on the two legal issues he considered and ultimately determined the case namely; identification and circumstantial evidence. He did not elaborate on what they entail. It is not surprising therefore that the assessors' opinions do not have any bearing on those legal aspects. For assessors to give a focused and useful opinion they must, during summing up, understand the facts of the case in relation to the law. On this, we adopt the illustration in the case of **Washington Odindo v. R**, (1954) 21 EACA 392 by the erstwhile Court of Appeal for Eastern Africa that: -

"The opinion of assessors can be of great value and assistance to a trial judge only 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."

In the present case while it is apparently clear that the learned magistrate appreciated the law on those two vital points of law and sufficiently elaborated them in his judgment, he indeed, did not adequately sum up to the assessors before inviting them to give their opinion. That was fatal.

By way of concluding our deliberation on this complaint, we find ourselves constrained to pay homage and fully subscribe to our pronouncement on insufficiency of summing up notes in the case of **Abdalla Bizare and Others v. R** [1990] T. L. R. 42 where we stated that: -

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

In fine and analogously, exercising our powers of revision conferred upon us by section 4(2) of the Appellate Jurisdiction Act, Cap. 141 R. E. 2019, we declare the whole trial in Criminal Sessions Case No. 11 of 2019 a nullity. We accordingly quash the appellant's conviction and set aside the sentence and we order a retrial according to law before another Magistrate (Ext. Jur.) to whom the case should be duly transferred. Meanwhile, the appellant has to remain in prison custody to await a retrial which we direct that it should be expedited.

DATED at **IRINGA** this 24th day of March, 2022.

S. A. LILA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The Judgment delivered this 24th day of March, 2022 in the presence of appellant in person and Ms. Magreth Mahundi, learned State Attorney for the respondent/Republic is hereby certified as a true copy of the original.

E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL