IN THE COURT OF APPEAL OF TANZANIA
AT MBEYA

(CORAM: MKUYE, J.A., GALEBA, J.A. And KIHWELO, J.A.)

CRIMINAL APPEAL NO. 232 OF 2019

1. **GEOFREY NTAPANYA**
2. **NDONGO MBESHI** ..... **APPELLANTS**

VERSUS

DPP ..... **RESPONDENT**

(Appeal from the decision of the High Court of Tanzania at Mbeya)

(Ngwembe, J.)

dated the 24th day of April, 2019
in
Criminal Session Case No. 5 of 2016

.....

JUDGMENT OF THE COURT

7th & 15th February, 2022

MKUYE, J.A.:

The appellants, Geofrey Ntapanya and Ndongo Mbeshi together with two other persons who were acquitted by the trial court were arraigned before the High Court of Tanzania at Mbeya for the offence of murder contrary to sections 196 and 197 of the Penal Code, [Cap. 16 R.E. 2002; now 2019]. It was alleged in the facts of offence that the said persons on 15th day of May, 2012 at Chunya District and Mbeya Region did jointly and together murder one Shoma Gide.

When the information was read over and explained to the accused, they all pleaded not guilty to the charge whereupon the prosecution marshalled seven (7) witnesses to prove the charge and for the defence, the appellants testified on their own. On top of that the prosecution produced two documentary exhibits, that is, the Postmortem Examination Report and the sketch map (Exh. P1 and P2) respectively and for the defence also two (2) exhibits that is the statement of Gida Mawe (Exh. D1) and Karatasi ya maelezo ya Ramadhani Shumbi (Exh. D2) were produced.

When each side closed its case, the trial judge summed up the case to the assessors as per section 298 (1) of the Criminal Procedure Act, [Cap. 20 R.E. 2002; now R.E. 2019] (the CPA) as shown at pages 92 to 108 of the record of appeal. Thereafter, the assessors gave their respective opinions that the appellants were guilty whereas the former 3rd and 4th accused persons were not guilty.

In his judgment, the trial judge agreed with the assessors' opinion and found the appellants guilty, entered conviction and condemned them to the mandatory sentence of death by hanging. On the other hand, the 3rd and 4th accused were not found guilty and acquitted forthwith.

The appellants, dissatisfied by the decision of the High Court have appealed to this Court. On 28th June, 2019 they filed their self-crafted memorandum of appeal consisting six (6) grounds of appeal which for a reason to be apparent shortly, we shall not reproduce them. Yet, in January, 2022 the appellants' advocate lodged a supplementary memorandum of appeal on only one ground of appeal hinging it on the improper summing up of the case to the assessors by the trial judge. The learned counsel also filed a very detailed written submission in support of all grounds of appeal.

When the appeal was called on for hearing on 7th February, 2022, the appellants were represented by Mr. Mika Mbise, learned advocate; whereas the respondent Republic was represented by Mr. Baraka Mgaya assisted by Ms. Nancy Mushumbusi, both learned State Attorneys.

Before the hearing of the appeal could commence in earnest, the Deputy Registrar of the Court of Appeal intimated to the Court of his receipt of the Death Certificate from the Prison's Authority to the effect that the 1st appellant, Geofrey Ntapanya passed away on 4th February, 2022. On that account, Mr. Mbise prayed to the Court under Rule 78 (1) of the Tanzania Court of Appeal Rules, 2009 (the Rules) to mark his appeal abated. As the prayer was not contested by Mr. Mgaya, we marked the

same abated under Rule 78 (1) of the Rules with an order that we shall proceed with the hearing of the 2nd appellant's appeal.

Upon being given the floor to argue the appeal, Mr. Mbise in the first place prayed to adopt both memoranda of appeal and the written submission in its support. After having done so, he opted to begin with the seventh ground of appeal (the sole ground in the supplementary memorandum of appeal). He then took off by assailing the trial judge that he included extraneous matters when he said there was a "big" Chinese (torch) lamp illuminating in the whole room which did not feature in evidence. He argued that there is nowhere in the record of appeal where the size of the alleged Chinese made lamp (torch) was stated by PW1 or any other witness. It was his view that, this might have influenced the assessors to return a verdict of guilty against the 2nd appellant.

In addition the learned counsel went on arguing that the trial judge in summing up to assessors did not direct them on vital elements of law. He pointed out that the trial judge did not address them on the issue of visual identification which was relied on in his judgment. He submitted that since the incident took place at night, it was imperative upon the trial judge to explain to the assessors factors which enabled the witnesses to identify the 2nd appellant such as the conditions which prevailed at that time, the size of the room, the place the Chinese lamp was placed, the

distance where the said lamp was hanged considering that the attack was sudden and horrific. In this regard, it was the learned counsel's contention that under those circumstances it can not be said that the trial was with the aid of the assessors. He, thus, concluded that the conduct of trial was unfair, thereby vitiating the whole trial.

In response, Mr. Mgaya conceded to Mr. Mbise's argument that the trial judge did not properly direct the assessors on vital points of law. He pointed out that, from page 92 to 108 of the record of appeal, the trial judge summarized the evidence of witnesses. He argued further that, since the incident took place at night the issue of visual identification was involved and as such the trial judge ought to have explained to the assessors what entails visual identification such as what made the witnesses identify the suspects; the distance from where they were to the suspects; the time taken in the commission of the offence; whether or not the witnesses knew the appellant before the incident.

In the circumstances, it was his argument that failure to do so by the trial judge rendered the summing up to be irregular and hence, the same was a nullity together with the judgment thereof.

In relation to the issue that the trial judge included extraneous matters in the summing up by the use of the word "big" Chinese (torch)

lamp, the learned State Attorney equally conceded to it since none of the witnesses testified to that effect. However, he argued that it did not influence the assessors in their verdict.

In this regard, he prayed to the Court to nullify the proceedings, quash the judgment thereof, set aside the sentence meted out against the appellant and order for a retrial since there is still sufficient evidence against the 2nd appellant, particularly, from PW1 and PW2 who explained the whole incident.

On the other hand, Mr. Mbise was not amused with the way forward proposition made by Mr. Mgaya. It was his argument that looking at the evidence generally, particularly, on the visual identification it is not watertight. He argued that ordering a retrial was tantamount to enabling the prosecution to fill in gaps. He, therefore, implored the Court to allow the appeal and release the 2nd appellant from custody.

We have considered the uncontested opinion on the issue that the trial judge did not direct the assessors on vital points of law relating to the visual identification evidence which was amply relied on in grounding the conviction against the 2nd appellant as well as importation in the summing up of extraneous matters.

According to section 265 of the CPA, all criminal trials before the High Court are mandatorily required to be with the aid of assessors. And, in terms of section 298 (1) of the CPA, after the prosecution side and the defence side have closed their respective cases, the trial judge is required to adequately sum up the evidence of both sides to the assessors before they are invited to give their opinions. The purpose of summing up to the assessors is to enable them to give an informed opinion or correct opinion. It should be also noted that the opinion of assessors can be of great value to the trial judge only if they understand the facts of the case in relation to the relevant law. This position was emphasized in the case of **Mbalushimana Jean -Marie Vienney @ Mtokambali v. Republic**, Criminal Appeal No.102 of 2016 (unreported) where the Court cited the case of the defunct East African Court of Appeal in **Washington Odindo v. Republic** [1954] 21 EACA 392 in which it was stated that:

> *"...the opinion of assessors has potential to be of great value where the assessors fully understand the facts of the case before them as it relates to the relevant law. That, where the law is not explained and the assessors are not drawn to salient facts of the case, the value of their opinion is invariably reduced."*

See also **Omary Khalfan v. Republic**, Criminal Appeal No. 107 of 2015; **Hamis Basil v. Republic**, Criminal Appeal No. 165 of 2017; **Augustino**

Nandi v. Republic, Criminal Appeal No. 388 of 2017; **Ramadhani Omary and Another v. Republic**, Criminal Appeal No. 210 of 2017; and **Malambi Lukwaja v. Republic**, Criminal Appeal No. 71 of 2018 (all unreported).

In this regard, it is noteworthy that in a trial where assessors are involved, the trial judge in summing up to the assessors, must not only summarize the evidence of the witnesses but also explain the law or vital points of law in relation to the facts available. (See **Samitu Haruna @ Magezi v. Republic**, Criminal Appeal No. 429 of 2018 (unreported); and **Omari Khalfan** (supra).

In this case, it is vivid from the summing up to assessors that the trial judge gave a summary of evidence from both the prosecution and defence. In the summing up notes, apart from summarising the evidence, the trial judge pointed out some vital points of law to guide the assessors. For instance, he explained to them, the definition of murder as per section 196 of the Penal Code; malice aforethought as per section 200 of the Penal Code; the burden and standard of proof that lies on the prosecution; and that the accused is convicted on the basis of the strength of the prosecution case and not on the weakness of his defence.

However, in the judgment from pages 133 to 156 of the record of appeal, the trial judge summarised the evidence from both prosecution and defence witnesses which was followed by the issues framed at page 151 of the record of appeal. The issues were dealt with from page 151 onwards. Of particular interest, in answering the issue as to whether or not the 2nd appellant participated in killing the deceased, that is when the trial judge discussed at considerable length the principles relating to visual identification especially during the night; that it is weak and unreliable and that courts should only act on it when satisfied that possibilities of mistaken identity are eliminated. Thereafter, the evidence of PW1 and PW2 who were eye witnesses was discussed and analysed and came to the finding that PW1 and PW2 were able to identify the 2nd appellant from the help of light of Chinese made lamp which was hanged on the wall; that PW1 and PW2 described the light; that the 2nd appellant demanded money which enabled the witness to have ample time to observe them; that the 1st and 2nd appellant were neighbours to both PW1 and PW2 in the same village; that PW1 mentioned the 2nd appellant to PW3 to be among the assailants; and the fact that the 2nd appellant injured PW2 with a machete implies that they were close. In the end, this was the main evidence that culminated into his conviction with the offence of murder.

However, these factors relating to the visual identification at night were not explained to the assessors during summing up.

We have passed through the opinion which was given by the assessors after having been given an opportunity to do so. For ease reference we take the liberty of reproducing them as found at pages 107 to 108 as under:

> *1st Assessors:*
>
> *Since I heard this case from the beginning, this case is divided into parts; therefore, the 1st and 2nd accused persons participated in killing the deceased due to evidence of PW1 and PW2..."*
>
> *2nd Assessors:*
>
> *Malice aforethought were in 1st, 2nd and 3rd accused. They pre-planned the offence and they knew what was going to happen. The 4th accused did not know the plan for he was enticed by 2nd accused (Ndongo Mbeshi) who knew what he was going to do, while the 4th accused did not know the intention, there was no common intention with the 4th accused. The 3rd accused did not participate in killing, but he had malice aforethought though he was outside the room. The confession statement of 4th accused, include all three accused but exonerates the 4th accused..."*

3rd Assessors:

The 1st and 2nd accused persons participated in killing the deceased, but 3rd and 4th accused did not participate, but they knew what was happening."

We have reproduced the opinion of the assessors so as to show that they do not suggest that they were directed on such vital point of law relating to visual identification and the factors to be considered on such kind of evidence having regard to the fact that the offence was committed at night. We say so because none of the assessors mentioned the issue on how the appellants were identified. Their opinion based on other factors.

It is therefore, our considered view that failure by the trial judge to address them on visual identification which was greatly relied upon in convicting the appellant amounted to non-direction on vital points of law to the assessors.

We have also considered the rival submissions of the learned counsel in relation to the trial judge's inclusion of extraneous matters and we agree with both counsel that, indeed, the trial judge included in the summing up matters that were not stated in evidence. At page 95 of the record of appeal line 14 to 17 the trial judge stated that:

"... According to him, were 1st accused Geofrey Ntapanya and 2nd accused Ndongo Mbeshi, whom he said, he identified them through a "big" Chinese (torch) lamp which was illuminating the whole room."

On that aspect as shown at page 12 of the record of appeal, PW1 testified that he identified the assailants with the help of "a lamp made in China" which illuminated the whole room. As it can be seen in PW1's testimony there was no mention of "big" or "torch". This means that, the trial judge added extraneous matters in the summing up to assessors. In the case of **Yustine Robert v. Republic**, Criminal Appeal No. 329 of 2017 (unreported), the Court was confronted with akin situation whereby extraneous matters were included in evidence. In its deliberation the Court adopted the case of **Okethi Okale and Others v. Republic** [1965] 1 EA 555 and emphatically stated as hereunder:

"In every criminal trial a conviction can only be based on the weight of actual evidence adduced and it is dangerous and inadvisable for the trial judge to put forward a theory not canvassed in evidence or in counsel's speech."

Also, in the case of **MT 101296 Omary Mwichande and 3 Others v. Republic**, Criminal Appeal No. 71 of 2016 (unreported), the Court emphasized on the trial judge to desist from disclosing his own

views, making remarks or comments which might influence the assessors in one way or another in making up their minds on matters for their consideration.

In this case, as the trial judge included extraneous matters which did not originate from the testimony of the witness, we agree with Mr. Mbise that this was an irregularity which had the effect of vitiating the summing up. Since, it is not allowed to include extraneous matters in the summing up, the possibility of influencing the assessors cannot be overruled.

With regard to the issue of the way forward, we have considered the rival arguments from the learned counsel and, we think, in the interest of justice it would be prudent to order for a retrial from the stage of summing up to the judgment. We think, a retrial should not affect the trial before the summing up stage.

In the event, in exercise of the revisional powers bestowed on us under section 4(2) of the AJA, we nullify the summing up notes to the assessors and the judgment thereof, quash the conviction and set aside the sentence of death meted out against the 2nd appellant. We order for an expeditious retrial from the stage of summing up to the assessors up to the judgment before the same judge and set of assessors. For

avoidance of doubt, we further order that, meanwhile the 2nd appellant shall remain in custody to wait for the said retrial.

It is so ordered.

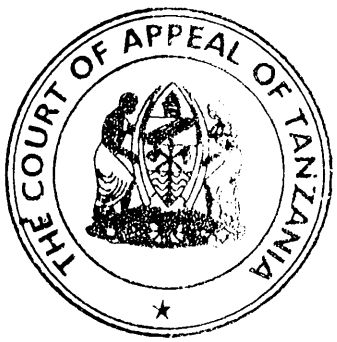
DATED at **MBEYA** this 12th day of February, 2022.

R. K. MKUYE
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

Judgment delivered this 15th day of February, 2022 in the presence of Ms. Nancy Mushumbusi, learned State Attorney for the Respondent/Republic and holding brief for Mr. Mika Mbise, counsel for the Appellants, is hereby certified as a true copy of the original.



C. M. MAGESA
DEPUTY REGISTRAR
COURT OF APPEAL