IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: MUGASHA, J.A., KEREFU, J.A. And KIHWELO, J.A.)

CRIMINAL APPEAL No. 547 OF 2019

NDARO SUMUN MABUSE@ AMIRI@RONALDO.....1ST APPELLANT

MSIBA MAREGERI @MBOROGOMA.....2nd APPELLANT

ABEID KAZIMILI @ FIDELIS MGEWA.....3RD APELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

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

(Mdemu, J.)

dated the 11th day of September, 2019

in

Criminal Sessions Case No. 189 OF 2013

.....

JUDGMENT OF THE COURT

4th & 8th July, 2022

KIHWELO, J.A.:

This appeal arises from the decision of the High Court of Tanzania sitting at Musoma (Mdemu, J.) in which, NDARO SUMUNI MABUSE @ AMIRI @ RONALDO, MSIBA MAREGERI@ MBOROGOMA and ABEID KAZIMILI @FIDELIS MGEWA (the appellants) on 11.09.2019 were found guilty of murdering TABU MAKONYA ("the deceased"). According to the information to which the appellants pleaded not guilty, it was alleged that on 21.12.2012 at Kwibara Village within Butiama District in Mara Region, the appellants

murdered one Tabu Makanya contrary to section 196 and 197 of the Penal Code [Cap.16 R.E. 2002; now R.E. 2022] (the Penal Code).

The facts of the case, in all their painful detail, are essentially told by Nyasinde Marubira (PW1), Mwajela Marubira Masasi (PW2) and other prosecution witnesses and show that, on 21.12.2012 the deceased was sleeping in her house along with PW1 and her grands who were sleeping in the same room while PW2 was sleeping in another room. At around 23:00 hours suddenly, PW2 heard the main door of their house being broken and a group of bandits stormed inside and using their torch, three of them went straight where PW2 was sleeping and started demanding money and a mobile phone. Terrified, PW2 told the bandits that she had no money and the mobile phone was being charged somewhere else, something which forced the bandits to proceed to another room where the deceased and PW1 were sleeping but before they left her room, PW2 was able to identify the first appellant and one Chegenge Nyakubondya who is not part of this case, with the aid of an illuminating lamp which was in the sitting room. Upon entering the deceased's bedroom, the bandits started demanding for money and when the deceased replied that she had no money, the first appellant and Ndakubondia started attacking severely the deceased using sticks and machete. Shockingly, PW1 and PW2 started screaming for help but the

bandits could not stop attacking the deceased with machete and sharp sticks and later they chopped of the head of the deceased who succumbed to death. Then they kept the deceased head in the bag and left with it running. Quite fortunately, neighbors who came for rescue chased the bandits who were compelled to drop the bag containing the deceased head and ran away.

The matter was then reported to the police who set wheels of justice in motion. The Post-Mortem Examination Report indicated that the cause of death was due to head separation and multiple cut wounds. The appellants who were identified by PW1 and PW2 during the incident were arraigned at different times and locations and later arraigned in court on an information of murder and stood trial in which seven prosecution witnesses testified. To protest their innocence, the appellants stood themselves as defence witnesses and in their oral sworn testimonies they denied any involvement in the killing incident. They were duly convicted and accordingly sentenced to suffer death by hanging.

In compliance with the requirements of section 265 of the Criminal Procedure Act, [Cap 20 R.E. 2002; now R.E. 2022] (the CPA) the learned trial Judge sat with three assessors and at the conclusion of the case for the prosecution and the defence, the learned trial Judge summed-up the case to

the assessors who then returned a unanimous verdict of not guilty in respect of all the appellants. On his part, the learned trial Judge dissented with the assessors, he found it proven upon the evidence of the prosecution witnesses that the appellants were responsible for the murder of the deceased. Accordingly, they were convicted and sentenced as shown earlier.

At the hearing of the appeal before us, Mr. Deocles Rutahindurwa, learned advocate represented the first appellant, Mr. Kassim Gilla, learned advocate represented the second appellant while Mr. Nasimire represented the third appellant as earlier on hinted. On the adverse, Mr. Emmanuel Luvinga Senior State Attorney and Ms. Lilian Meli, learned State Attorney, represented the respondent Republic.

Initially, the appellants in an attempt to vindicate their innocence lodged respective memoranda of appeal on 13.02.2020 containing a number of grounds of grievance which for reasons to be apparent shortly we will not reproduce them. Nonetheless, before the hearing of the appeal commenced in earnest Mr. Anthony Nasimire, learned advocate for the third appellant sought and was granted leave for and on behalf of other counsel for the appellants to abandon the memoranda of appeal earlier on lodged in Court by the appellants and in their place substitute with the respective

Memoranda lodged by each counsel on 29.06.2022. Mr. Nasimire further prayed to adopt the respective memoranda of appeal and contended that since counsel for the appellants have raised a common issue he prayed that instead, they be allowed to argue that single common ground contained in the memoranda of appeal. The common ground of appeal which Mr. Nasimire beseeched us to consider may be crystalized as follows:

> *"That, the Honourable trial Judge of the High Court erred in law by failure to direct the assessors on vital points of law from the evidence on record."*

In his brief but focused submission in support of the appeal, Mr. Nasimire on behalf of other counsel for the appellants faulted the learned trial Judge for not following the law in as far as involvement of the assessors is concerned. It was his contention that, the learned trial Judge did not direct assessors on the vital points of law involved in the case and referred us to pages 214 to 228 of the record of appeal in which the learned trial Judge summed up to assessors. Elaborating further on this point, he contended that the learned trial Judge did not direct the assessors on essential points of law such as malice aforethought which is an essential ingredient of the said offence as stated under sections 196 and 200 of the Penal Code. Similarly, he contended further that, although the learned trial Judge

acknowledged that visual identification in the instant case was a key element relied upon to convict the appellant which assessors should consider in determining whether the appellants were properly identified or not. To justify his proposition, he referred us to page 227 of the record of proceedings.

Mr. Nasimire went further to fault the learned trial Judge for not directing the assessors on the issue of alibi and confession which is contained in exhibit P4 as well as the identification parade.

On the way forward, Mr. Nasimire urged us to nullify the proceedings and judgment of the trial court, quash the conviction and set aside the sentence.

Upon being prompted by the Court on the propriety of nullifying the proceedings while the infraction was only in the summing up notes to the assessors, Mr. Nasimire was quick to respond and implored upon us to give the appropriate orders as the Court finds it appropriate. On their part, Mr. Rutahindurwa and Mr. Gilla joined hand with Mr. Nasimire in supporting the appeal and the submission by Mr. Nasimire without more.

Replying, Ms. Meli informed us that she was supporting what the counsel for the appellants submitted and as to the way forward, she invited us to partially nullify and set aside, the proceedings of the trial court starting

from the irregularly conducted summing up notes up to the judgment. Reliance was placed in our earlier decision in **Mashaka Athumani @ Makamba v. Republic,** Criminal Appeal No. 107 of 2020 (unreported).

It is common place that all trials before the High Court must be conducted with the aid of assessors. The basic statute that guides the conduct of trials with the aid of assessors and the procedure to be followed is obtained in Part III of the CPA and more specifically sections, 265, 283 and 285 of the CPA. We think, we should first appreciate what these provisions of the law provide. Section 265 of the CPA provides:

> *"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."*

Furthermore, section 283 of the CPA which provides for the procedure to be adopted after the plea of not guilty has been entered at the commencement of trial reads as follows:

> *"Where the accused person pleads "not guilty" or if the plea of "not guilty" is entered in accordance with the provisions of section 281,* ***the court shall proceed to choose assessors,*** *as provided in section 285 and try the case."* [Emphasis added]

Similarly, section 285 which relates to selection of assessors reads:

"(1) Where a trial is to be held with the aid of assessors, ***the assessors shall be selected by the court.***

(2) N/A" [Emphasis added]

Clearly, reading between lines the above provisions of the law, it is conspicuously clear that, all criminal trials before the High Court have to be with the aid of assessors and understandably, we emphasized this in the case of **Iddi Muhidini @ Kabatamo v. Republic**, Criminal Appeal No. 101 of 2008 (unreported). It is important to stress also that, where assessors are involved there are certain mandatory procedural and legal requirements which must be strictly complied with in order to bring them on board and one such requirement is for the learned trial Judge to direct them on essential points of law in that particular case. This is crucial so as to enable the assessors to give rational and informed opinion on the guilt or otherwise of the accused.

Now, coming to the issue which was argued by the learned counsel for the appellants and admitted by the learned State Attorney in relation to the irregular summing up by the learned trial Judge, we are enjoined to interrogate and determine whether the summing up was, indeed, irregular and, if so, whether it vitiated the trial.

At the outset, we wish to reaffirm the time-honored principle of law under section 265 of the CPA that all criminal trials before the High Court must be conducted with the aid of at least two assessors. In addition, a trial Judge sitting with assessors is required by section 298 (1) of the CPA to sum up the case to the assessors before inviting them to give their opinion. Section 298 (1) of the CPA provides that:

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

The above provision has been interpreted in such a way that, although the word "may" in ordinary usage connotes discretion, but in this context, it has been interpreted as imposing a mandatory requirement on the trial Judge to sum up the evidence. Indeed, the Court echoed that position in **Mulokozi Anatory v. Republic**, Criminal Appeal No. 124 of 2014 (unreported) where it stated:

> *"We wish first to say in passing that though the word 'may' is used implying that 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, the trial judge sitting with assessors have invariably been summing up cases to the assessors."*

[Emphasis added]

When summing up, the learned trial Judge is duty bound to explain all the vital points of law relevant to the case. There is a long and an unbroken chain of authorities stressing the importance and duty imposed on trial High Court Judges who sit with the aid of assessors, to sum up adequately to those assessors. See, for example, **Omari Khalfan v. Republic,** Criminal Appeal No. 107 of 2015, **Said Mshangama @ Senga v. Republic,** Criminal Appeal No. 8 of 2014, **Masolwa Samwel v. Republic,** Criminal Appeal No. 206 of 2016 and **Lazaro Katende v. DPP,** Criminal Appeal No. 146 of 2018 (all unreported). In the case of **Omari Khalfan** (supra) the Court when faced with an akin situation reiterated the importance of summing up to assessors underscored in the defunct Court of Appeal for Eastern Africa in **Washington s/o Odindo v. R** [1954] 21 EACA 392 thus:

"The opinions of the assessors can be of great value and assistance to the trial judge but 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".

Admittedly, there is no exhaustive list of what are the vital points of the law which the trial High Court should address to the assessors and consider when making their respective judgments. In the case of **John Mlay v. Republic**, Criminal Appeal No. 216 of 2007 (unreported), the Court underscored what should be considered in a proper summing up, that is to say:

"All essential elements/ingredients in a case, burden of proof and the duty of the prosecution to prove the case beyond reasonable doubt, elaboration on the cause of death, malice aforethought and main issues in the case including, but not limited to the nature of the evidence, credibility of witnesses etc."

In the instant case, we subscribe to the concurrent submission by the learned counsel that the learned trial Judge's summing up to the assessors was clearly irregular. First and foremost, it is evident from summing up notes that the learned trial Judge did not address assessors on vital points such as malice aforethought, defence of alibi, confession and identification parade

as being some basic vital points of law governing the case before the trial court. Also, the issue of visual identification and the circumstances upon which the court may convict based upon visual identification was not very well addressed and therefore making the value of their respective opinions correspondingly depreciate. We note at pages 227 and 228 of the record of proceedings that the assessors unanimously returned the verdict of not guilty against the appellants but none of them was able to relate the evidence to any of the principles applicable.

In view of the non-directions committed in the summing up canvassed above, we are constrained by the law to hold that the appellants' trial was unfair for non-direction of the assessors on vital point of law because it cannot be said to be one conducted with the aid of assessors as envisaged under section 265 of the CPA.

The above makes the trial of the appellants a nullity and all things being equal, ordinarily we would have nullified the entire proceedings, but aware of the peculiar circumstances of this case we will take a different course. First of all, this appeal emanates from a conviction and sentence in a second trial. The first trial was declared a nullity by this Court on 21.12.2017 in Criminal Appeal No. 358 of 2015 since the trial Judge (De-

Mello, J) made a number of irregularities which went to the root of the trial including improper summing up to the assessors. Secondly, we have considered the non-availability of witnesses as there is no guarantee that they will be around or easily reachable considering the fact that the offence occurred on 21.12.2012 approximately ten years now. Thirdly, and of great significance in the orderly administration of justice, we are duty bound to guard against the prospect of giving the prosecution a chance to fill in gaps in its evidence at the trial. See, for instance, **Fatehali Manji v. R** [1966] EA 334. Finally, in our case, the only irregularity is in respect of the summing up notes to the assessors as there was no irregularity in their selection and participation unlike in other cases where a fresh trial was ordered. It is for the foregoing reasons, we think, in all fairness and justice ordering a fresh summing up to the assessors serves the interest of justice better.

For these reasons, we partially nullify and set aside, the proceedings of the trial court starting with the irregularly conducted summing up notes up to the judgment and all orders subsequent thereof. For avoidance of doubt, the proceedings before the summing up notes shall not be affected by this decision. We quash the appellants' conviction and set aside the sentence and direct the learned trial Judge to prepare fresh and proper summing up notes before the same set of assessors expecting that they will

be properly directed on the facts and the relevant law before composing a fresh judgment. We further order expedited compliance of the Court Order. Meanwhile the appellants shall remain in custody.

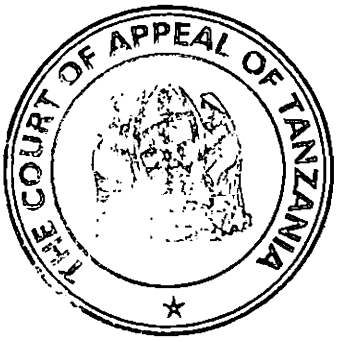
DATED at **MWANZA** this 6th day of July, 2022.

S. E. A. MUGASHA
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

The Judgment delivered this 8th day of July, 2022 in the presence of Mr. Nasimiri, learned advocate for the third appellant, who also holds brief for Mr. Rutahindurwa, learned advocate for the first appellant and Mr. Gilla, learned advocate for the second appellant and Ms. Mwamini Y. Fyeregete, learned State Attorney for Respondent/Republic, is hereby certified as true copy of the original.



H. P. Ndesamburo
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL