IN THE COURT OF APPEAL OF TANZANIA

AT DAR-ES-SALAAM

(CORAM: MUGASHA, J.A., LEVIRA, J.A., And MWAMPASHI, J.A.)

CRIMINAL APPEAL NO. 668 OF 2020

ERICK GABRIEL KINYAIYA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Dar-es-salaam)

(Mgonya, J.)

dated 11th day of November, 2020

in

Criminal Sessions Case No. 104 of 2015

.....

JUDGMENT OF THE COURT

19th & 21st September, 2022

MUGASHA, J.A.:

The appellant was charged with the offence of murder contrary to section 196 of the Penal Code Cap 16 RE. 2002. It was alleged by the prosecution that, on or about the night of 23/2/2015 at Stavi Guest House, Kichangani area within the Municipality, District and Region of Morogoro, appellant did murder one Zalia Kambi, the deceased. He denied the charge. In order to prove the charge, the prosecution paraded a total of seven (7) prosecution witnesses and three documentary exhibits. On the other hand, the accused defended himself as he had no witnesses and he categorically denied the prosecution's allegations that he murdered Zalia Kambi.

At the conclusion of the hearing of the case for the prosecution and the defence, the learned trial Judge summed up the evidence to the assessors who all returned a unanimous verdict of not guilty. Nonetheless, the learned trial Judge was fully satisfied that on account of circumstantial evidence paraded by the prosecution, the offence of murder was sufficiently proved against the appellant. Thus, he was found guilty, convicted and sentenced to the mandatory death sentence. The appellant is seriously aggrieved by the conviction and sentence imposed by the trial court, hence the present appeal fronting the following grounds of complaint:

1. *That, the learned trial Judge erred in law for failure to direct the assessors on vital points of law in the summing up, inter alia, malice aforethought; principles of the nature, value, and application of circumstantial evidence, the evidential value of retracted confession statement and evidence of alibi which was relied on by the appellant.*
2. *That, the appellant was subjected to an unfair trial since no cognizance whatsoever of the appellant's defence of alibi was taken into account by the trial Court.*
3. *That, the learned trial Judge erred in law and fact to convict the appellant based on pieces of circumstantial evidence from PW2,*

PW3, PW4, and PW7 which is lacking, contradictory, and not proved beyond a reasonable doubt.

4. *That, the learned trial Judge grossly misdirected herself in law for holding that the retracted confession statement of the appellant which require corroboration can corroborate the evidence of PW4 which also require corroboration.*

5. *That, the learned trial Judge erred in law by shifting the burden of proof to the appellant when the trial Court held that "the burden of denying the liability that it is not the appellant who killed the deceased lies to the appellant.*

6. *That, the learned trial Judge erred in law and facts to convict the appellant as the last person seen with the deceased and violate a long-established principle of law that one last seen with the deceased does not mean that it is him who murdered the deceased.*

7. *That, the learned trial Judge erred in law and fact to convict the appellant without considering the variance between information and evidence of PW4 and the name that appears in the guest house register.*

8. *That, the learned trial Judge erred in law and fact to convict the appellant relying on pieces of circumstantial evidence which the facts from which the inference of guilty was drawn were not proved beyond reasonable doubt.*

Moreover, the appellant lodged a Supplementary Memorandum of Appeal raising six (6) grounds of complaint. On account of what is to unfold in due course, we have opted not to reproduce the grounds of complaint in the supplementary memorandum and the factual account on what transpired at the trial.

When the appeal was called on for hearing, the appellant was present and had the services of Mr. Nehemia Nkoko, learned counsel whereas the respondent Republic was represented by Ms. Janeth Magoho and Ms. Anna Chimpaye, both learned Senior State Attorneys.

At the outset, Mr. Nkoko adopted the written submissions filed by the appellant in support of the grounds raised in the memoranda of appeal. Addressing the first ground in the Memorandum of Appeal, in both oral and written submissions, it was the appellant's complaint that, the trial was vitiated by the irregularity surrounding the summing up as the learned trial Judge who did not address the assessors on vital points of law to wit: **one,** what constitutes malice aforethought; **two,** the evidential value of the retracted or repudiated cautioned statement of the appellant; **three,** the meaning of circumstantial evidence; and **four,** the defence of *alibi*. On this, it was Mr. Nkoko's argument that, the omission to conduct a proper summing up was in violation of the provisions of section 298(1) of the

Criminal Procedure Act [CAP 20 R.E 2020] (the CPA) and as such, the trial was not conducted with the aid of assessors as required under section 265 of the CPA. To bolster his propositions, Mr. Nkoko cited to us among others, the cases of **Sijali Shabani v. Republic,** Criminal Appeal No. 533 of 2017 and **Emmanuel Stephano v. Republic,** Criminal Appeal no. 413 of 2018 (both unreported).

On the way forward, it was Mr. Nkoko's submission that, although in the circumstances surrounding the present matter, ordinarily, the Court would order a retrial, he argued that in the instant case such course is not worthy because of the discrepant prosecution account which is not sufficient to prove the charge of murder against the appellant. He thus urged the Court to allow the appeal and set the appellant at liberty.

On the other hand, save for the complaint on malice aforethought the learned Senior State Attorney conceded that the learned trial Judge did not address the assessors on vital points of law as raised by the appellant. She was of the view that, the point of law pertaining to malice aforethought was adequately addressed to the assessors and on this, we were referred to page 92 of the record of appeal. She added that, in the wake of cogent prosecution account and since it is the summing up which was flawed, a retrial is not the proper remedy. On the way forward, the

learned Senior State Attorney implored on the Court not to acquit the appellant and instead, nullify the summing up to the assessors, quash and set aside the conviction and sentence meted on the appellant and return the case file to the trial court for it to conduct a proper summing up and thereafter compose a fresh judgment.

Having considered the submissions of the learned counsel and the record before us, they are both at one that it is the summing up which was irregular having not being properly conducted. However, they parted ways on the way forward. While Mr. Nkoko submitted against a retrial arguing that the prosecution account is weak and implored on the Court to acquit the appellant, Ms. Magoho opposed the stance taken by Mr. Nkoko.

It is a trite law that, at the summing up the trial Judge is duty bound to explain all vital points of law relevant to the case in relation to the salient facts of the case. This has been emphasized in a number of decisions including the case of **Washington s/o Odindo v. Republic** [1954] 21 EACA 392 whereby, the erstwhile Eastern African Court of Appeal held:

> *"The opinion of 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 opinion of assessors is correspondingly reduced."***

[Emphasis supplied].

See also: **Tulubuzya Bituro v. Republic** [1982] T.L.R. 264, **Suguta Chacha &Two Others v. Republic**, Criminal Appeal No. 101 of 2011 (unreported), **Charles Kidaha &Two Others v. Republic**, Criminal Appeal No. 395 of 2018 (unreported), **Richard Mateo Siame v. D.P.P**, Criminal Appeal No. 173 of 2017 (unreported) and **Mashaka Athumani @ Makamba v. Republic**, Criminal Appeal No. 107 of 2020 (unreported).

As correctly submitted by the learned counsel for either side, it is glaring from pages 374 to 381 of the record of appeal that, in the summing up notes the learned trial Judge did not address the assessors on the meaning of: malice aforethought, circumstantial evidence, defence of *alibi* and the evidential value of the retracted or repudiated cautioned statement of the appellant. However, the learned trial Judge relied on the said points of law in relation to the evidence adduced to convict the appellant without having initially addressed the assessors. A glimpse on the opinions of the assessors at pages 107 to 109 clearly shows that, their unanimous return

of the verdict of not guilty was premised on the lacking direct evidence against the appellant on the killing incident signifying that, they had completely had no clue on the meaning of circumstantial evidence upon which was founded the appellant's conviction as concluded by the trial Judge. In this regard, it cannot be safely vouched that the assessors were informed to make rational opinions which renders the summing up not compatible with the dictates of section 298 (1) of the CPA.

Moreover, since it is settled law that, it is the proper summing up which can enable the assessors to fully understand the facts of the case before them in relation to the relevant law, which is crucial for them to make rational and informed opinions to aid the Judge in a criminal trial, in this matter, the omission to explain the law and draw their attention of assessors to the salient facts of the case, incapacitated the assessors from giving valuable opinions to the learned trial Judge which correspondingly reduced the value of their opinion. See: **Washington s/o Odindo v. Republic** (supra).

On account of what transpired at the summing up to the assessors, the omission to address them on the stated vital points of law, is an incurable irregularity which cannot be remedied by the provisions of section 388 (1) of the CPA. On the way forward, we agree with the learned

Senior State Attorney that, since it is only the summing up to the assessors which was flawed, as flanked by the learned counsel which is as well evident on the record before us as to the active participation of the assessors at the trial, neither the acquittal nor retrial sound to be a proper recourse as asserted by Mr. Nkoko. We are fortified in that regard having considered a retrial not worthy because the trial was properly conducted and it was not vitiated by the irregular summing up to the assessors by the learned trial Judge. In view of what we have endeavoured to discuss, the 1st ground of complaint is merited and it suffices to dispose of the appeal and as such, we shall not dwell on the remaining grounds of complaint.

We are aware that following the amendment of section 265 of the CPA vide Written Laws Miscellaneous Amendment Act No. 1 of 2022, it is no longer mandatory to conduct a criminal trial with the aid of assessors. However, in the case at hand since the trial was conducted with the aid of the assessors, the provisions of section 298(1) must be complied with to the letter and the summing up to the assessors must be conducted in accordance with the prescribed requirements of the law.

Therefore, all said and done, in the interests of justice, we hereby nullify the purported summing up to the assessors, the impugned judgment, quash and set aside the conviction and sentence meted on the

appellant. Consequently, we order the case file to be returned to the High Court for the learned trial Judge to prepare fresh and proper summing up notes and properly address the assessors on the facts of the case and the relevant law, receive their respective opinions before composing a fresh judgment.

DATED at **DAR-ES-SALAAM** this 20th day of September, 2022.

S. E. A. MUGASHA
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The Judgment delivered this 21st day of September, 2022 in the presence of the appellant in person linked-Via Video from Ukonga Prison, and Ms. Sabina Ndunguru, learned State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.

S. P. MWAISEJE
DEPUTY REGISTRAR
COURT OF APPEAL