IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: WAMBALI, J.A., KOROSSO, J.A. And RUMANYIKA, J.A.)

CRIMINAL APPEAL NO. 18 OF 2020

FAUSTINE S/O SABUNI @ JILALA ..... 1ST APPELLANT
SAMIKE S/O MWIHULO @ KWILASA ..... 2ND APPELLANT
JUMA S/O CLEOPHACE @ KULUNGWANA ..... 3RD APPELLANT
KULWA S/O SHIJA @ GWASHI ..... 4TH APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT
(Appeal from the decision of the High Court of Tanzania at Dar es Salaam)

(Masara, J.)

Dated the 2nd day of December, 2015
in
HC. Criminal Sessions Case No. 115 of 2015

JUDGMENT OF THE COURT

6th July, & 20th September, 2022

RUMANYIKA, J.A.:

Before the High Court of Tanzania at Dar es Salaam, on 07/10/2014 Faustin Sabuni @ Jilala, Samike Mwihulo @ Kwilasa, Juma Cleophace @ Kalungwana and Kulwa Shija @ Gwashi (hence forth "the 1st, 2nd, 3rd and 4th appellants") respectively were jointly charged with the offence of murder contrary to section 196 of the Penal Code [Cap. 16 R. E. 2002] now R. E. 2022). It was alleged in the information that on 06/09/2014 at Kigamboni Pemba Mnazi in the District of Temeke, Dar es Salaam Region,

the appellants murdered Idrisa Lutebuka @ Melasi, the deceased. As they all denied the allegation in the information by pleading not guilty, a full trial was conducted by the High Court.

To support its case, the prosecution lined up eleven witnesses and tendered six exhibits at the trial. The appellants called no one. They were themselves the defence witnesses and tendered two exhibits. Eventually, after the trial court considered the evidence for both sides, the appellants were found guilty, convicted and sentenced to suffer death by hanging.

Dissatisfied, they have appealed against the conviction. Their grievances were initially expressed in a joint memorandum of appeal comprising six grounds of appeal filed on 16/05/2022. However, acting for the 3rd and 4th appellants Mr. Roman Masumbuko, learned counsel who was assigned to represent them, in terms of rule 73(3) of the Tanzania Court of Appeal Rules, 2009, filed a supplementary memorandum of appeal consisting eight grounds. On the other hand, Mr. Nehemia Nkoko, also learned counsel, who appeared for the 1st and 2nd appellants did not lodge a supplementary memorandum of appeal as he intended to rely on the one jointly lodged by the appellants. However, before we commenced the hearing, he agreed with Mr. Masumbuko to

compress the grounds of appeal in the substantive and supplementary memoranda of appeal into four as follows:

1. *That, the assessors were not duly selected and improperly gave joint opinion contrary to the requirement of the law.*
2. *That, the prosecution exhibits were improperly tendered and admitted in evidence.*
3. *That, the witnesses whom the substance of the evidence were not read during committal proceedings wrongly testified at the trial contrary to the requirement of the law.*
4. *The prosecution case was not proved beyond reasonable doubt.*

For the purpose of this judgment, though the counsel for the parties submitted for and against all the grounds of appeal, for the reason to come to light shortly, we shall not reproduce, or, in any way analyse the evidence of the parties adduced at the trial.

At the hearing of the appeal, Mr. Nehemia Nkoko, learned counsel appeared for the 1st and 2nd appellants. Mr. Roman Masumbuko, learned counsel represented the 3rd and 4th appellants. On the other side, Ms. Ester Martin and Ms. Subira Mwalumuli, both learned Senior State Attorneys, and Mr. Adolf Verandumi, learned State Attorney, appeared for the respondent Republic.

Submitting in support of the first ground of appeal, Mr. Nkoko argued that the involvement and participation of the assessors who set with the trial judge was not in accordance with the requirement of the law. He argued that the thrust of his argument is based on the following reasons. **One**, assessors were not properly selected before they were called upon to take part in the proceedings of the trial. He submitted that according to the record of appeal, though they were shown in the Coram of the trial court on 11/2/2019, there is neither indication of their age nor whether they were duly selected as required by section 285 of the Criminal Procedure Act [Cap. 20 R.E. 2019] (the CPA). **Two**, there is no indication in the record of appeal that assessors were informed of their role and responsibility before they took part in the trial contrary to the requirement of the law. **Three,** after the summing up was done by the trial judge to the assessors, one of them purported to give joint opinion on behalf of his colleagues contrary to the requirement of the law prescribed under section 298(1) of the CPA.

In the circumstances, Mr. Nkoko argued that the trial judge's omission offended the law to the extent of rendering the trial court's proceedings incurably defective liable to be nullified as the trial was not conducted by involving the assessors fully as required under section 265

of the CPA. To support his argument, he cited our decision in **Bushiri Ahmad @ Nakamo & Another v. Republic,** Criminal Appeal No. 74 of 2019 (unreported).

Mr. Nkoko submitted further that should the Court grant the appellants' prayer to nullify the tainted proceedings, we should refrain from ordering a retrial because it will cause injustice to them as it would give room to the prosecution to fill in the gaps. In this regard, he pressed us to acquit the appellants on the contention that the prosecution case was not proved beyond reasonable doubt. In his opinion, there is insufficient evidence as the exhibits were wrongly admitted and relied on evidence of witnesses whom the substance of their evidence was not made known to the appellants during committal proceedings wrongly testified at the trial.

On his part, Mr. Masumbuko entirely agreed with Mr. Nkoko submissions on this ground and strongly urged us to nullify the trial court's proceedings. He equally pressed us to refrain from ordering a retrial because as submitted by Mr. Nkoko, it will not be in the interest of justice.

In reply, though Ms. Martin unreservedly supported the appellants' counsel in respect of the irregularities in the involvement and participation of the assessors' participation at the trial and the consequences to follow on the status of the proceedings, conviction and the sentence meted, she strongly differed on the way forward. She argued that though the issue of selection and information to the assessors on their role and responsibility may be curable under section 388 of the CPA, she had no doubt that their joint opinion violated the law and vitiated the trial court's proceedings. The effect of the omission, she submitted, is to nullify the proceedings, quash the appellants' convictions and set aside the sentences. However, she contested the appellants' counsel submission that an order of a retrial should not be made on the contention that the prosecution case was not proved to the required standard. She submitted that the alleged irregularities in the admission of exhibits, involvement of unlisted witnesses and insufficiency of evidence cannot be the basis for not ordering a retrial as the entire trial proceedings are a nullity. On her part, considering the factual setting of the case on record, a retrial will be in the interest of justice to the parties.

Having heard the counsel' submissions in respect of the first ground of appeal, we subscribe to their unreserved concession that the

cumulative effect of the omission of the trial court to comply with the law in respect of the involvement and participation of the assessors during the trial offended the law and rendered the proceedings a nullity. The record of appeal is patently clear that assessors who set with the trial judge were not selected and informed their responsibility before they were called upon to take part in the proceedings. We must emphasize that the selection of assessors and the trial judge's duty to inform them their responsibility during the trial is important to ensure not only that the law is complied with but also to enable them fully participate in the proceedings and in the end offer meaningful opinion on the verdict to be reached by the trial court. In the premises, we find it pertinent to reiterate what we stated in **Hilda Innocent v. The Republic**, Criminal Appeal No. 181 of 2017 (unreported) on the importance of the trial judge's duty to inform assessors their responsibility during the trail thus:

> *"It is also a sound practice that a trial judge has to show in the record that this task has been fully preformed. 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."

We are aware of the argument by the learned Senior State Attorney that the above raised omission may be curable depending on the circumstances. However, in the present matter, we are satisfied that the omission with regard to the failure of the trial judge to inform assessors their responsibility and what they were expected to do after the summing up of the case disabled them to understand that they were supposed to give individual and not joint opinion on the case in the end. For clarity, we better reproduce the relevant part of the proceedings in the record of appeal on what transpired after the trial judge concluded his summing up to the assessors:

"We are also ready I have instruction from my colleagues.

Court:

The assessors say they have joint opinion. Salim Ismail Mirongo, on behalf of all assessors state as follows:

-We listen to the case keenly from the beginning. PW1, PW2 and PW8 evidence of identification by PW1 and PW2 is water tight. From the evidence

prosecution has proved its case beyond reasonable doubts. They should be convicted.

Sgd. Y. B. Masara
Judge
28/06/2019"

As noted from the reproduced excerpt, it is clear to us that the assessors seemed not to be aware that their joint opinion was contrary to the provisions of section 298(1) of the CPA which required them to opine individually. This might have been caused by the fact that assessors were not properly informed their responsibility before the trial commenced and about their individual role of giving opinion after the summing up by the trial judge. Unfortunately, the trial judge did not also make reference to the said joint opinion of assessors in his judgment.

For avoidance of doubt, section 298 (1) of the CPA provides as follows:

*"298 (1) – **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 Court has emphasized the necessity of compliance with the provisions of section 298(1) of the CPA in several decisions including, **Yusuph Sylivester v. Republic,** Criminal Appeal No. 126 of 2014 and **Emmanuel Malobo v. Republic,** Criminal Appeal No. 356 of 2015 (both unreported). Particularly, in **Yusuph Sylivester v. Republic** (supra), we held as follows:

> ***"Where assessors give a joint opinion, the opinion is in vain and the trial is deemed to have been one without the aid of assessors*** *and vitiates the entire proceedings".* [Emphasis added].

In the circumstances, we agree with the parties' counsel that the cumulative effect of the trial court's omission vitiated the proceeding rendering them a nullity as the trial was deemed not to have been with the aid of assessors contrary the provisions of section 265 of the CPA.

Ordinarily where the procedure is fatally flawed like is the case at hand, we would nullify the tainted proceedings and order a retrial from where the irregularity became apparent. Nonetheless, in the present matter, we are settled that the omission of the trial judge dented the

entire proceedings from the point before the parties were called upon to adduce their evidence. However, before we conclude we need to resolve the contending submissions of the parties' counsel on whether or not a retrial will be in the interest of justice in the circumstances of the case at hand.

For our part, without going into the detailed submissions of the counsel with regard to the alleged irregularities and the insufficiency of evidence, having carefully examined and weighed the rival submissions of the counsel for the parties in the light of the factual setting on record and the circumstances of the case, we are constrained to hold that an order for a retrial will be in the best interest of justice to the parties.

We therefore allow the first ground of appeal. In the event, as this ground suffices to dispose of the appeal, we do not have to consider the three remaining grounds of appeal.

Consequently, pursuant to section 4 (2) of the Appellate Jurisdiction Act [Cap 141 R.E. 2019], we exercise the power of revision bestowed in the Court to revise and nullify the trial court's proceedings, quash the convictions and set aside the sentences meted on the appellants. We further order an expedited retrial before another judge

from the initial stage of the trial to be conducted in accordance with the current requirement of the law in terms of section 285 (2) enshrined by the Written Laws (Miscellaneous Amendments) Act, No. 1 of 2022 with regard to the involvement of assessors. Meanwhile, the appellants are to remain in custody pending retrial.

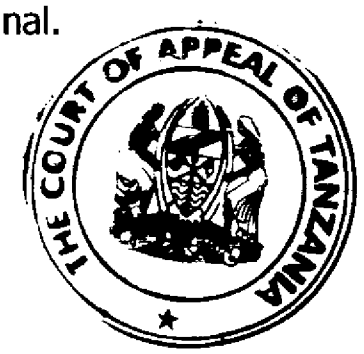
DATED at **DAR ES SALAAM** this 16th day of September, 2022.

F. L. K. WAMBALI
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

S. M. RUMANYIKA
JUSTICE OF APPEAL

The Judgment delivered this 20th day of September, 2022 in the presence of Mr. Wilson Ogunde, learned counsel for the 1st and 2nd Appellants also holding brief for Mr. Romani Masumbuko, learned counsel for the 3rd and 4th Appellants, Appellants who are connected via video facility from Ukonga Prison and Mr. Jaribu Bahati, learned State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.



F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL