IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: KWARIKO, J.A., KEREFU, J.A., And MAIGE, J.A.)

CRIMINAL APPEAL NO. 204 OF 2021

MANGAPI ISSA.....APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the Court of the Resident Magistrate at Morogoro)

(Kabate, PRM- Ext. Jur.)

dated the 19th day of April, 2021
in
Extended Jurisdiction Criminal Sessions Case No. 86 of 2018

JUDGMENT OF THE COURT

20th & 29th September, 2022.

MAIGE, J.A.:

At the centre of this appeal, is the death of Rajabu s/o Ramadhani @ Mgunya (the deceased) which happened at Mandera village, Tangini area within Kilosa District in Mrogoro Region on 24th December, 2016. The appellant was charged with the respective offence of murder contrary to section 196 of the Penal Code [Cap. 16 R.E. 2002 now R. E. 2022] and committed to the High Court of Tanzania at Dar es Salaam for trial. However, in terms of section 256A (1) of the Criminal Procedure Act [Cap. 20 R.E. 2002, now R. E. 2022] hereinafter referred to as "the CPA", the High Court transferred the taking of plea and the trial of the appellant to the Court of the Resident Magistrate of Morogoro at Morogoro (the trial court) to be conducted

by Kabate, PRM with extended jurisdiction. The appellant denied the charge and upon a full trial, the trial court found the appellant culpable of the offence charged and thus sentenced him to the statutory sentence of death by hanging and henceforth the instant appeal.

Before we proceed further, it is desirable to expose albeit briefly, the substance upon which the appellant was convicted. Nine witnesses were produced in a bid to establish the prosecution case. Of all, none asserted to have witnessed the murder of the deceased. Indeed, the prosecution case was based on two types of evidence; circumstantial evidence and confessional statements in the forms of a cautioned statement (exhibit P2) and extra-judicial statement (exhibit P3).

Pensi Daimond (PW7) testified that, on the material date at around 20:48 hours while at his kiosk, the deceased and the appellant came desiring to take some hard drinks. As there was no such drinks in that particular time, the two departed. Once again, the two approached PW7 for the same purpose at 23:20 hours. This time, PW7 was at his residential home. As it was too late, PW7 refused to sell any to them. On the next day during morning, PW7 saw some people running towards the school premises. When he went there to see what was up, he found the dead body of the deceased lying aside the road. Daudi Francis (PW1), a police officer at Dumila Police Station, visited the scene of the crime after the incident had been reported to him by

the Village Executive Officer and found the dead body of the deceased surrounded by a number of people. Upon interview of some of them, he was told that the appellant was the last person to be seen with the deceased. He was further informed that the appellant had travelled to Dar es Salaam on the same day in the morning. The dead body of the deceased was examined by Dr. Fredy Mwanyesa (PW2). He found multiple injuries on its face with clotted blood. It was established as per exhibit P1 that, the cause of death was severe anaemia due to internal and external bleedings.

Salum Aman Mohamed (PW5), a resident of Tandale in Dar es Salaam by then, having been informed by one Juma Ramadhani that the appellant was wanted by police in conection with the murder under discussion, managed to establish the whereabouts of the appellant on 26th December, 2016 and reported to a Police Officer one Anselm Thobias Mbise (PW6) right away. Subsequently, on the same day, PW6 arrested the appellant at "Uwanja wa Fisi" in Tandale area in Dar es Salaam and detained him at Magomeni Police Station until on 28th December, 2016 when he was picked up by No. G. 2151 DC Said (PW9) and conveyed to Dumila Police Station on 29th December, 2016. On the same day, the appellant was interviewed by No. F. 644 DC Yusuph (PW3) and confessed to have committed the offence as per the cautioned statement in exhibit P2. He made a similar confession on

the same day before the justice of peace one Fredy Simon Bogela (PW8) as per the extra-judicial statement in exhibit P3.

In his testimony in defence, the appellant while admitting to have been at the village on the material date and that, he had informed the deceased of his intended journey to Dar es Salaam, denied being involved in the murder incident. He claimed to have been forced to make the confession in exhibit P2 by reason of touture. On the extra-judicial statement, it was his evidence that, he was commanded by PW3 to do so.

As we said above, the trial court convicted the appellant after being satisfied that the case against him had been proved beyond reasonable doubt. In the memorandum of appeal, the appellant has questioned the validity and correctness of the same on five grounds of appeal. For the reason which shall be apparent sooner than longer, we find it unnecessary to reproduce all the grounds of appeal.

At the hearing, the appellant was represented by Mr. Musa Mhagama, learned advocate while the respondent was represented by a team of three learned Senior State Attorneys namely; Mses Easter Kyara, Beata A. Kittau and Sylivia Mitanto.

In the first and second grounds of appeal which in our view are capable of disposing of the appeal, the legality of the judgment and proceedings of the trial court is doubted on three aspects. **First**,

opinions of assessors were given in the absence of a summing up notes. **Second**, the appellant was denied an opportunity to comment on suitability of the selected assessors. **Third**, the trial court allowed the assessors to cross examine the witnesses.

In his submissions which was conceded by Ms. Kittau for the respondent, Mr. Mhagama faulted the trial court in admitting the opinions of assessors into the record without there being a summing up notes as mandatorily required by section 298(1) of the CPA. Relying on the case of **Charles Samwel v. R,** Criminal Appeal No. 78 of 2019 (unreported), the counsel contended that the ommission renders the trial as deemed to have been conducted without assessors and thus null and void. Another irregularity, the counsel submitted, was selection of assessors without affording the appellant a right to make any comment on their suitability which in his contention affected the substantial legality of the whole proceedings of the trial court. On the issue of the assessors cross-examining the witnesses, the counsel drew the attention of the Court at pages 34 and 67 of the record of appeal.

As to what should be the way forward, the counsel contended that, in the circumstance of this case, retrial is not appropriate for the reason that, the prosecution will be in a position to fill in gaps in the evidence. To the contrary, Ms. Kittau submitted that, in view of the evidence on the record and more so the appelant's confessional

statements in exhibits P2 and P3, retrial is the appropriate way forward. She denied of there being possibility of the prosecution filling in the gaps. Besides, she opposed the assertion that the assessors cross examined witnesses and insisted that all questions asked by assessors were with a view to getting clarification from the respective witnesses.

From the counsel's submissions, it is apparent that, whether the assessors were selected without the appellant being afforded an opportunity to comment and whether the trial proceeded without summing up to assessors is not debatable. Equally so for the question of whether the effect of the omission is to render the trial unfair and thus null and void. The controversy, which we have taken note of, is on what should be the way foward after nullification of the judgment and proceedings of the trial court.

We have gone through the record very carefully and considered the counsel's submissions on this issue. We entirely subscribe to them that the judgment and proceedings of the trial court are fatally defective for want of a summing up notes to the assessors and denial of the appellant's right to comment on the suitability of the selected assessors. We understand that though the power to select assessors under section 265 of the CPA is on the trial Judge, the accused person enjoys right to, before commencement of the trial, object to any of them. There are many authorities in support of this position. For

instance, in **Laurent Salu and 5 Others v. R**, Criminal Appeal No.176 of 1993 (unreported), it was observed:

> *"It is a rule of practice which, however, is now well established and accepted as part of the procedure in proper administration of criminal justice in the Country. The rationale of the rule is fairly apparent. The rule is designed to ensure that the accused has a fair hearing".*

A similar position was taken in **Malambi s/o Lukwaja v. the Director of Public Prosecutions**, Criminal Appeal No. 71 of 2018 (unreported) where it was held that failure to give the accused person an opportunity to object or not to the selection of assessors, is a fatal irregularity which vitiates the judgment and proceedings of the trial court.

The duty of the trial Judge to make a summing up notes to the asssessors before they give opinions, is set out in section 298(1) of the CPA which 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 above provision has been construed severally by the Court to mean that, the duty therein imposed is mandatory such that its non-compliance renders the judgment and proceedings of the trial court null and void. Therefore, in **Makubi Kweli & Another v. Republic,** Criminal Appeal No. 149 of 2015 (unreported) it was held that *"failure to record the summing up notes in a trial is a fatal anomaly which renders the entire proceedings a nullity."* See also **Othman Issa Mdabe v. Director of Public Prosecutions,** Criminal Appeal No. 95 of 2013 (unreported).

Guided by the above authorities, it is our firm view that; since the appellant was denied a right to comment on the suitability of the selected assessors and in so far as the assessors' opinions were not preceded by a summing up notes by the trial magistrate with extended jurisdiction, the judgment and the whole proceedings are null and void.

This now takes us to the issue of what should be the appropriate way foward. The counsel for the appellant has proposed for setting the appellant free while the counsel for the respondent has proposed for retrial. On our part, having considered the rival submissions in line with the principles in **Fatehali Manji v. R** [1966] E.A. 343, we are of the opinion that the justice of the case requires that a trial *denovo* of the appellant be ordered.

In the final result and for the foregoing reasons, we nullify the proceedings of the trial court, quash the conviction and set aside the sentence meted out against the appellant. We order for an expediated retrial of the appellant before another Resident Magistrate with extended jurisdiction and a new set of assessors. In the meantime, the appellant should remain in custody pending his retrial.

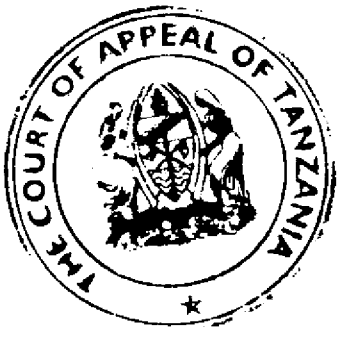
DATED at **DAR ES SALAAM** this 28th day of September, 2022

M. A. KWARIKO
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

The judgment delivered this 29th day of September, 2022 in the presence of the Appellant in person linked-via video from Ukonga Prison facility at Ukonga prisons and Ms. Imelda Mushi, learned State Attorney for the respondent, is hereby certified as a true copy of the original.



J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL