

IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

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

CRIMINAL APPEAL NO. 478 OF 2019

NATHAN ELIAS 1ST APPELLANT

MOSES KASITU 2ND APPELLANT

ELIAS MZUMBWE 3RD APPELLANT

VERSUS

DPPRESPONDENT

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

(Mambi, J.)

dated 17th day of September, 2019

in

Criminal Sessions Case No. 23 of 2016

JUDGMENT OF THE COURT

27th September, & 19th October, 2022

RUMANYIKA, J.A.:

The appellants herein stood charged for murder of one Vasco s/o Njowela contrary to sections 196 and 197 of the Penal Code, Cap 16, R.E. 2002 (Now R.E.2022). It was alleged that on 25th July, 2014 at about 19:30 hours at Mpemba area within Songwe Region they murdered Vasco Njowela, the deceased.

The prosecution had a total of ten witnesses at the trial, whereas the appellants were themselves the defence witnesses.

PW1 was the medical officer who did the autopsy on the deceased's body and found out as per the post-mortem report on examination, exhibit P2. PW2 was the police officer who prepared the identification parade on which the 2nd and 3rd appellants were identified and picked. PW3, one Habib Mpemba was the owner of the shop and money allegedly stolen by the appellants in incident of murder. He was on safari at Tunduma at the material time. PW4, DC Lackson, was the police officer who took the gun and the cartridges of the ammunition allegedly involved in the incident of murder to the ballistic expert in Dar es Salaam for verification. PW5, DC Joseph was the police officer who investigated the matter. He prepared the sketch map of the crime scene and arrested the second and third appellants and their arrest led to the first appellant's arrest. PW6 was DC Micah who recorded the second appellant's cautioned statement. PW7, DC Pascal was the one who recorded the third appellant's cautioned statement. PW8, Joseph Salvatory Kate participated in the search of the first appellant's house in Makambako where they seized the short gun allegedly involved in the incident. PW9, Inspector Paulo Mgema, was a ballistic expert who examined the short gun and the magazine. He confirmed and concluded that the two magazines were related to that short gun as established in the examination report, exhibit P8. The last but not least witness was PW10, Rehema Saidi, a shop assistant and eye witness with whom one of

the deceased were just at the PW3's main gate to hand over the proceeds of that day. She heard gun shots in the air and saw all the culprits. One of the deceased and a culprit confronted each other. She identified the first appellant at the crime scene.

On their part, the appellants denied the charges. They pleaded innocence and relied on the defence of *alibi*. The second and third appellants challenged the outcomes of the identification parade which implicated them for the offence charged.

At the end, the trial judge, was beyond reasonable doubt satisfied. He found all the appellants guilty as charged and sentenced them to death by hanging. Dissatisfied, the appellants are before the Court appealing.

Initially, the 1st appellant had a memorandum of appeal with 7 grounds filed on 23/04/2020, and then the 2nd and 3rd appellants had one containing seven grounds jointly filed on 18/05/2020. However, on 23/09/2022, through Mr. Luka Ngogo, Learned Advocate all the appellants filed the current five-grounds in a Supplementary Memorandum of appeal. Those grounds are reproduced as follows:

1. That the trial Court erred to convict the appellants basing on evidence testified by PW4, PW6, PW7, PW8 and PW9 who were not listed among of the intended prosecution witnesses during committal.
2. That the trial before the High Court was a nullity for failure to explain the role of assessors and improper summing up to assessors.
3. That the trial court erred in law and fact to convict the first appellant basing on Exhibit 6 while the same left a lot to be desired.
4. That the trial court erred in law and facts to convict and sentence the 2nd and 3rd appellants basing on visual identification and identification parade while the same left a lot to be desired.
5. That the trial court erred in law and facts to convict and sentence the appellants for murder while the charges against them was not proved beyond reasonable doubt.

At the hearing of the appeal, Mr. Luka Ngogo, learned advocate appeared for the appellants, whereas Ms. Prosista Paulo and Mr. Joseph Mwakasege learned State Attorneys appeared for the respondent Republic.

When the appeal was on for hearing on 27/09/2022, Mr. Ngogo abandoned the appellant's joint memorandum of appeal filed on 18/05/2020

and adopted the Supplementary Memorandum of appeal filed on 23/9/2022. It contained five grounds of grievance as listed above.

Mr. Ngogo chose to start with arguing ground numbers 1, 3, 5, 4, and then 2.

As regards the 1st ground of appeal, he submitted that PW4, PW6, PW7, PW8 and PW9 were not, during the committal proceedings/preliminary hearing listed as intended witnesses or their statements read out but without leave sought and granted, they testified in court, their evidence was considered and it formed part of the appellant's conviction. He implored us to expunge that evidence because it contravened the provisions of section 289 (1) (3) of the CPA. To support his point, he cited our decisions in **Emmanuel Stephano v. R.**, Criminal Appeal No. 413 of 2018 and **Charles Samwel v. R.**, Criminal Appeal No. 78 of 2019 (both unreported).

For the 3rd ground, Mr. Ngogo submitted that the 1st appellant's conviction was based on exhibit P6 which is for the above stated reason liable to be expunged since it was tendered by PW8 whose evidence contradicted the provisions of section 298(1) and (3) of the CPA as alluded above.

On the 5th ground of appeal, he submitted that in sum, the evidence on record was too insufficient to prove the prosecution's case beyond reasonable doubt.

As regards the 2nd ground of appeal, Mr. Ngogo contended that the assessors did not have their role explained to them by the trial judge. Nor did he explain to them the vital legal points including the doctrine of recent possession to enable them give an informed opinion. For those reasons he implored us to nullify the whole proceedings of the trial court as were vitiated by the said omission.

As for the way forward, Mr. Ngogo asked the Court to restore the appellants' liberty to avoid the respondent, if it is ordered, to take advantage of the retrial and fill the gaps.

In reply, Ms. Paul quickly supported the appeal. On the 1st ground of appeal, she contended that indeed the evidence of PW4, PW6, PW7, PW8 and PW9 was improperly taken and formed the basis of the appellants' conviction in contravention of the provisions of sections 246 (2) and 289 (1) (3) of the CPA such that, similarly, the documentary evidence, Exhibits P4, P6, P7 and P8 and P9 attached thereto are liable to be expunged.

As regards the 2nd ground of appeal, she contended that throughout the proceedings it is clear that the assessors were engaged and guided improperly, as appearing in the summing up notes at pages 93-109 of the record of appeal. The learned trial Judge did not explain to them the vital legal points. Additionally, Ms. Paul contended that both the search and the subsequent Certificate of Seizure, Exhibit P6 appearing at pages 127-128 of the record of appeal needed to be supported by the independent witnesses allegedly Elizabeth Ilangala and Shabani Shomari, who did not appear in court and no reasons were given for their nonappearance. On that one, Ms. Paul implored us to draw adverse inference in favour of the appellants. To support her point, she cited our unreported decision in **Samwel Kibundali v. R.**, Criminal Appeal No. 190 of 2020.

Similarly, Ms. Paul challenged PW10's visual identification of the 1st appellant and the results of the identification parade subsequently mounted by the police. She reasoned that PW10 did not, at the earliest possible opportunity name and describe the 1st appellant nor did she tell the duration she observed him, the distance between him and the culprits and the light intensity from the alleged electric lamps to make the identification possible and proper. To bolster her point, Ms. Paulo cited to us our unreported decision in **Samson Chacha @ Mwita Pius @ Kipepeo v. R.**, Criminal Appeal No. 76 of 2018. In her

second breath, PW10 alleged to have identified the 3rd appellant, and no longer the 1st appellant. Still impeaching PW10's credibility, Ms. Paul rounded up questioning the sketch map of the crime scene (exhibit P11). She argued that the one who drew the sketch map did not indicate the position of the alleged electric lamps which shone at the crime scene, to rule out any possibilities of mistaken identity. For the above reasons, she urged us to nullify the trial court's proceedings, quash the impugned decision, set aside the sentence and restore the appellant's liberty without an order of trial because the prosecution's evidence was too shaky and insufficient to prove its case beyond reasonable doubt.

The central issue for consideration is whether the assessors were properly guided to assist the trial court to arrive at the impugned decision. It concerns with the 2nd ground of appeal.

For the reasons that will shortly come to light, we have chosen to dwell on the 1st ground of appeal mainly, because we think it is sufficient to dispose the entire appeal.

Before the Written Laws Miscellaneous Amendments Act, 2022 amendments, in such trials, like was the case, it was mandatory for the trial judge to sit with assessors who would, in the end and upon taking the trial

judge's summing up of the evidence, each assessor be required to state his opinion orally as to the case. To that effect, the provisions of section 298(1) of the Criminal Procedure Act, Cap 20 R.E.2019 (Now R. E. 2022) read as follows:

*" 298.-(1) Where 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).*

As read from the above provisions of the law, the trial judge's summing up of the evidence to the assessors is permissive and not mandatory; **two**, the assessors are required to opine orally on the case generally and on any question specifically addressed to them by the judge; **three**, once he decides to sum up the case to the assessors for the latter's opinion, the judge cannot choose which specific vital point of law canvased in those summing up notes to address or not to address the assessors to.

At least in this case it is not disputed, as appearing at page 43 of the record of appeal that when the case came for trial on 27/08/2019, after they were selected, and the appellants had no issue with them, Ms. Maria Mbwire,

Mr. Aron Mshami, and Mr. Ndusubiro Mgala, lady and gentlemen assessors took their seats to aid the trial Judge in the impugned proceedings.

We agree with Mr. Ngogo that the trial judge did not explain to them their role in that case but, with the exception of the judge's failure to address them on some specific vital legal points namely the doctrine of recent possession, visual identification, circumstantial evidence, the last person to be seen with the deceased, the doctrine of recent possession, confessional statement and malice afore thought, upon which the conviction of the appellants was based, the assessors played their role actively and sufficiently throughout the proceedings. For instance, where the need arose they put questions to the witnesses and finally opined to the case.

On our part, we accede to Mr. Ngogo's contention that the trial judge did not tell the assessors their role and for that reason what he expected from them do. Nonetheless, as contended by Mr. Ngogo, rightly so in our considered view, that the omission counted nothing. We so hold, because, from the record it is glaring that they participated fully throughout the proceedings. And, where the need arose, they put questions to the witnesses for clarification and finally opined as required under section 298 of the CPA. This, in our view suggests that from the outset of the case the assessors knew their role.

Now, what is the effect of the assessors being misguided, or, as is the case, not guided by the trial judge on the said vital points of law, it has been consistently held by the Court that misdirection or non-direction by the judge of the assessors on vital points of law vitiates the proceedings as that omission denies them an opportunity of being informed to ably give an informed and independent opinion. Stressing on the mandatory requirement of the judges' summing up the case to assessors, the Court made that proposition in **Mathayo Wilfred and 2 Others v. R.**, Criminal Appeal No. 294 of 2016, **Ntobagi Kelya and Another v. R.**, Criminal Appeal No. 234 of 2015, **Omari Khalfan v. R.**, Criminal Appeal No. 107 of 2015, **Said Mshangama @ Senga v. R.**, Criminal Appeal No. 8 of 2014 and **Yustine Robert v. R.**, Criminal Appeal No. 329 of 2017 (all unreported). For instance in **Yustine Robert case** (supra), the Court stated that:

"...The court was duty-bound to sum up adequately to the assessors on all vital points of law, especially the law relating to circumstantial evidence which it used to found conviction. Failure to do that was fatal...". (Emphasis added).

Applying the above legal proposition to the present circumstances and the case, we read it from the trial judge's summing up notes to the assessors appearing at pages 93-108 of the record of appeal; **one**, that he highlighted

more or less general principles, not specific to the case, which govern the courts in any criminal proceedings; **two**, it is a mere summary of the evidence adduced by the parties; **three**, it is a summary of the learned counsel's submissions for and against the case; and **four**, it highlights the issues for determination of the trial court. And then the judge sought the assessors' opinion who opined against the appellants. He recorded the opinion and pronounced the impugned judgment. It means therefore, that the trial judge raised the said vital points of law at a later stage in his judgment. The assessors therefore, could not have forum to air their independent opinion as required by law.

As it was alluded to before, a violation of the provisions of section 298(1) of the CPA has it that a court is properly constituted if the judge presides over the proceedings with the aid of assessors who are, at the closure of the parties' cases properly guided to give an informed, and independent opinion separately. We are therefore hastening to hold that any misguidance or, as happened in the present case, with respect to the said six vital non-guidance of the court assessors, it renders those court officers being reduced into mere observers of the proceedings in the court room. This has never been the intention of the legislature. Similarly, as the law stood then, by analogy, where applicable, a court which is not aided by assessor is improperly constituted and

its proceedings and the resultant decision are ineffectual. See- **Mathayo Wilifred** (supra) and **Ntobagi Kelya** (supra).

As for what should be the way forward, we subscribe to the learned attorneys' concession that the summation of the evidence on record considered, the prosecution case was not proved beyond reasonable doubt to justify the appellants' conviction and sentence. We are holding so for three main reasons; **one;** PW4, PW6 PW7 PW8 and PW9 and Exhibits P5-P9 appearing at page 52 through page 74 of the record of appeal is strange and it counts nothing because it was not introduced on 05/09/2016 in the committal proceedings at page 30 of the record of appeal as an intended evidence. As it was agreed by the parties and from the record noted, no leave of the court was sought and obtained for the evidence of those five key witnesses and five exhibits to have their way onto the record. Such evidence therefore, contravened the provisions of section 289 (1) of the CPA and the rule in **Emmanuel Stephano** (supra) and **Charles Samwel** (supra). The evidence related to the said five witnesses and five exhibits including the alleged visual identification of the 1st appellant is liable to be, and is hereby expunged from the record. For ease of reference and avoidance of doubt we are guided by section 289(1) of the CPA which reads thus:

"289.-(1) No witness whose statement or substance of evidence was not read at committal proceedings shall be called by the prosecution at the trial unless the prosecution has given a reasonable notice in writing to the accused person or his advocate of the intention to call such witness".

(Emphasis added).

It is an undeniable fact in this case that the said five witness and exhibits came to court without notice to the appellants, be it written or oral. There is therefore only one option, which is to discount and expunge that evidence from the record.

Two, all those gone, nothing will remain to substantiate the conviction of the appellants. **Three**, our reading of the said mandatory provisions of section 289(1) of the CPA will suggest that committal proceedings is another aspect and expression of a right to be heard of the subject, a principle of natural justice. As applied to this case, it is from the respective committal proceedings where the parties to the case get a sketch road map, in terms of substance of the forth coming evidence.

In conclusion, in exercise of the powers vested on us under section 4 (2) of the Appellate Jurisdiction Act, Cap 141 R.E. 2022, we hereby nullify the

proceedings of the trial court, quash the conviction and set aside the death sentence meted out to the appellants. Also, having considered the circumstances of the case, the evidence on record and the interest of justice we decline to order a retrial. Consequently, we allow the appeal to the extent above stated. We restore the appellants' liberty. Further, we order their immediate release from prison unless held there for some other lawful cause.

DATED at DAR ES SALAAM this 17th day of October, 2022.

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

S. M. RUMANYIKA
JUSTICE OF APPEAL

The judgment delivered this 19th day of October, 2022 in the presence of the Appellants in person Vide Video link to Ruanda Prison and Ms. Imelda Aluko, learned State Attorney for the respondent, is hereby certified as a true copy of the original.




R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL