IN THE COURT OF APPEAL OF TANZANIA

AT IRINGA

CORAM: WAMBALI, J.A., LEVIRA, J.A. And MAIGE, J.A.)

CRIMINAL APPEAL NO. 171 OF 2020

NELSON MKINI ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Decision of the High Court of Tanzania at Iringa)

(Kente, J.)

dated the 3rd day of January, 2020

in

Criminal Sessions Case No. 68 of 2015

JUDGMENT OF THE COURT

26th & 31st October, 2022

MAIGE, J.A.

In the High Court of Tanzania at Iringa (the trial court), the appellant was charged with and convicted of the offence of murder contrary to section 196 of the Penal Code [Cap. 16, R.E., 2019], (the Penal Code). He was accordingly sentenced to death by hanging.

The brief factual materials culminating in this appeal are as follows. The appellant and Cuthbert Mkini are indisputably the biological sons of Edig Mkini (the deceased) and Magrath Kidava. On 18th day of August, 2012, the appellant and the said Cuthbert went at the home residence of their parents at Ng'uhure village within Kilolo District in Iringa Region to see their sick mother. On reaching there, they found their sisters Maja Ejid Mkini (PW1) and Philomena Ejid Mkini together with the appellant's wife one Rhoda Kivamba (PW2) there taking care of the sick mother. They expressed their desire to spend their night thereat.

For the reason which is not on the record, the deceased was not happy to see the appellant sleeping at his residence. He, therefore, informed the appellant that he was going to report him to the police. All the sudden, Cuthbert reacted by uttering querulous words against the deceased. The two sisters and the appellant's wife went to the ten-cell leader Mr. Feruzi Mkini (PW3) to report what was going on. When they came back, they found the deceased lying down bleeding with his throat

appearing to have been cut by a machete. At that time, the appellant and his young brother Cuthbert had already disappeared.

The incident was reported to the police who came at the scene of crime with Dr. Christophe (PW5). The latter examined the dead body of the deceased and established as per Post Mortem Examination Report (exhibit P2) that, the deceased had passed away as a direct result of severe bleeding and brain damage.

It would appear, the appellant was arrested in January, 2015 and on 13th January, 2015 was interrogated by G. 6959 Detective Police Constable Filbert (PW4) and admitted as per the cautioned statement (exhibit P1) to have murdered the deceased.

In his defence, the appellant denied the allegation. He said, on 17th day of August, 2012, he visited his parents and other relatives at the village including his brother Cuthbert and that; on the next day, he left his parents alive having given them TZS. 200,000.00 to cater for their daily needs. He said, two years after when he visited again his parents, he was informed of the murder of his father without the name of the murderer

being disclosed. He claimed further that, on 5th January, 2015, he was arrested in connection with the offence. He was subsequently interrogated on the death of the deceased and caused to sign a document whose contents he did not know.

On full trial, the trial Judge concurred with the three gentle assessors he sat with that, the case against the appellant was proved beyond reasonable doubt. The trial Judge was persuaded by the circumstantial evidence of PW1, PW2 and PW3 as well as the appellant's confessional statement in exhibit P2. As we said above, the appellant was convicted and sentenced to death by hanging accordingly. Being dissatisfied with this decision, the appellant has appealed to the Court. Initially, he personally filed a memorandum of appeal. Subsequently, the initial memorandum of appeal was, with our leave, substituted with a new memorandum of appeal filed by his advocate in terms of rule 73 (2) of the Tanzania Court of Appeal Rules, 2009 containing the following grounds:

1. *That the trial High Court Judge erred both in law and fact by convicting the appellant basing on prosecution's case which did not prove the offence on the standard required by the law.*
2. *That the trial High Court Judge erred both in law in the manner of summing up the case to the assessors by failure to direct on vital points of law on circumstantial evidence and defence of alibi before convicting the appellant by the law.*
3. *That the trial Hlgh Court Judge erred both in law and fact for relying on improper admitted appellant's cautioned statement as a conclusive proof of his guilt.*
4. *That the judgment convicting the appellant is not a judgment at all for lacking sentence, for introducing new evidence not founded on the evidence before the trial court.*

At the hearing, Mr. Jassey Samuel Mwamgiga, learned advocate, appeared for the appellant whereas Ms. Pienzia Nichombe, learned Senior State Attorney, appeared for the Respondent Republic.

In his submissions, Mr. Mwamgiga started with the second ground of appeal. He submitted that, what appears to be a summing up note on the record of appeal does not constitute a proper summing up notes in so far as it lacks explanations on some vital points of law on the salient features

of the case. He clarified that, although the appellant was convicted on circumstantial evidence, there is nothing in the summing up notes explaining to the gentle assessors what is circumstantial evidence and how reliable is it in law. Further to the point, he submitted, there is nothing in the said note to the effect that, the gentle assessors were addressed on the nature of the defence evidence; namely, *alibi*. The omission to direct the gentle assessors on vital points of law, he submitted, is a fatal irregularity which renders the judgment and proceedings of the trial court a nullity. To that effect, he cited the case of **Richard Siame Mateo v. the DPP**, Criminal Appeal No. 173 of 2017 (unreported). He prayed thus, the appeal be allowed on the second ground and the judgment and proceedings of the trial court nullified. He further prayed that, the matter be remitted to the trial court for retrial. Having said that, he abandoned the rest of the grounds of appeal.

In response, Ms. Nichombe agreed with the counsel for the appellant on the impropriety of the summing up to assessors. Her main reason being that, while the trial Judge essentially based his decision on circumstantial

evidence and the presumption of the last person to be seen with the deceased, no explanation was given on what amounts to such evidence and how reliable is it. Thus, just as it was for the counsel of the appellant, she urged us to nullify the judgment and proceedings of the trial court and remit the case file for a retrial.

We have closely followed the concurrent submissions by the learned counsel and we find that, the question to be addressed in our judgment is whether what appears to be a summing up notes to assessors at pages 58 to 59 of the record of appeal is proper and correct in law. As far as we are aware, the law as it stood before the amendment brought by Act No. 1 of 2022 was such that, all criminal trials by the High Court were to be conducted with the aid of at least two assessors. This was in accordance with section 265(1) of the Criminal Procedure Act [Cap. 20 R.E. 2019] (the CPA). Section 298 of the CPA which has not been affected by the said amendment, 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."

As we understand the above provisions, the duty of the trial Judge in summing up to assessors is in two aspects namely; the substances of the evidence adduced by both sides and any specific vital questions that may arise from the evidence. Though the auxiliary verb used therein is "may", it is now settled, from case law that, the requirement is mandatory. Therefore, in **Omari Khalfan v. R**, Criminal Appeal No. 107 of 2015 (unreported), it was stated:

"the phrase the judge may sum up does not mean that the trial Judge can skip the summing up to assessors. This phrase has been expounded by the Court to imply a mandatory duty placed on the shoulders of the trial Judge to sum up."

The rationale behind the requirement lays on the fact that, a meaningful assessor's opinion depends upon there being a proper and

adequate explanations by the trial Judge of the salient features of the case and the principles of law involved. It follows thus, in the absence of adequate and correct summing up, it cannot be said that the opinions of the assessors were founded on correct apprehension of the evidence adduced and the principles of law governing reliability of such evidence. On this, the following pronouncement of the defunct Court of Appeal for East Africa in the case of **Washington Odindo v. R** [1954] 21 EACA 392 which we quoted in **Geofrey Ntapanya and Another v. R,** Criminal Appeal No. 232 of 2019 (unreported) is relevant. Thus:

> *"...the opinions of assessors has potential to be of great value where the assessors fully understand the facts of the case before them as it relates to the relevant law. That, where the law is not explained and the assessors are not drawn to salient facts of the case, the value of their opinions is invariably reduced."*

To make sure that the assessors fully participle in the trial, therefore, the summing up notes, as observed in **Haji Salim Mintanga v. R,** Criminal Appeal No. 366 of 2019 (unreported), "must be adequately made,

including directing the assessors on vital points of law involved in the case". Otherwise, the whole trial would be tantamount to a trial without assessors and thus a nullity. This is what we meant in **Said Idd Mshangama @ Senga v. R,** Criminal Appeal No. 8 of 2014 (unreported), where we said;

> *"As provided under the law, a trial of murder before the High Court must be with the aid of assessors. One of the basic procedure is that the trial judge must adequately sum up to the said assessors before recording their opinions. Where there is inadequate summing up, non-direction or misdirection on such vital points of law to assessors, it is deemed to be a trial without the aid of assessors and renders the trial a nullity. (see* ***Rashid Ally v. Republic,*** *Criminal Appeal No. 279 of 2010 (unreported)."*

In the instant case, it is manifestly apparent that the summing up notes to assessors does not comply with the mandatory requirement of section 298(1) of the CPA for two main reasons. **First,** there is nothing therein where the substance of the evidence of both sides is explained.

Though it is a fact that, visual identification was not in the evidence adduced, the trial Judge suggested in his summing up notes of there being such evidence. **Second,** there was no explanations therein on vital points of law involved in circumstantial evidence and the presumption of the last person to be seen with the deceased despite the fact that, the conviction was mainly based on such pieces of evidence. Besides, the summing up was absolutely mute on the principle of law characterizing reliability of confessional statement notwithstanding that, such evidence featured out in his decision.

In our opinion, therefore, the trial of this matter was, for the reason of incorrect and improper summing up, not conducted with the aid of assessors and therefore a nullity. Considering the circumstances of the case at hand, and the concurrent prayer of the counsel for the parties, we nullify the entire trial court's proceedings, quash conviction and set aside the sentence imposed on the appellant.

Consequently, we order that the appellant should be retried expeditiously before another Judge in compliance of the requirement under

the current provisions of section 265(1) of the CPA in respect of involvement of assessors. For the avoidance of doubt, the appellant shall, in the meanwhile remain in custody.

DATED at **IRINGA** this 28th day of October, 2022.

F. L. K. WAMBALI
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

The Judgment delivered this 31st day of October, 2022 in the presence of Mr. Jassey Mwamgiga, learned counsel for the appellant and Mr. Yahaya Misango, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.

J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL