IN THE COURT OF APPEAL OF TANZANIA

AT IRINGA

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

CRIMINAL APPEAL NO. 172 OF 2020

YUSUPH WILLY JOJO .... APPELLANT

VERSUS

THE REPUBLIC .... RESPONDENT

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

(Matogolo,J.)

dated the 6th day of March, 2020

in

Criminal Sessions Case No. 36 of 2016

JUDGMENT OF THE COURT

26th & 31st October, 2022

LEVIRA, J.A.:

In the High Court of Tanzania, Iringa District Registry at Iringa (the trial court) the appellant was charged with murder contrary to section 196 of the Penal Code [Cap 16 R.E. 2002, now R.E. 2022] (the Penal Code). After a full trial, he was convicted and sentenced to suffer death by hanging. Aggrieved, he has preferred the instant appeal.

The substance of prosecution evidence before the trial court was to the effect that, on the fateful day, that is, 21st July, 2014 at Mbolimboli Village in the Iringa Rural District and Region of Iringa, the appellant murdered one Ben Ignas Mduo (the deceased) who was his supervisor as

the appellant was a driver of a tricycle owned by the deceased's brother called Festo Ignas Mduo. The prosecution case against the appellant was based on the evidence of seven (7) witnesses and six (6) exhibits which included, the appellant's Extra Judicial Statement (exhibit P4) and cautioned statement (exhibit P5). In essence, the totality of prosecution case rested on circumstantial evidence which connected the appellant with the alleged murder of the deceased. In the end, the learned trial Judge was satisfied that it was the appellant who murdered the deceased despite his lone defence. It is noteworthy from the appellant's defence that though he disputed to have killed the deceased, he did not deny to have been with the deceased on the material day and time at the scene of crime.

Initially, the appellant lodged a memorandum of appeal comprising of ten (10) grounds of appeal. However, on 21st October, 2022 his advocate one Jally Willy Mongo filed a substituted memorandum of appeal in terms of Rule 73 (2) of the Tanzania Court of Appeal Rules, 2009 mainly comprising of three grounds as follows: -

> *"1. The honourable Judge erred in:*
>
> *(i) Failing to inform the assessors of their roles and responsibilities in the trial immediately after their selection.*

(ii) Failing to explain to the assessors the vital points of law relating to the case during summing up.

(iii) Making comments or remarks to the assessors during summing up of which the comments or remarks were outside the court record, hence, influenced the assessors in giving their opinion.

2. The honourable Judge erred in law and fact in:

(i) Admitting and relying upon exhibit P5 (cautioned statement) in convicting the appellant.

(ii) Relying upon exhibit P4 (Extra Judicial statement) in convicting the appellant.

3. That, from the record, the honourable Judge erred in law and fact in convicting the appellant with the offence of murder while the case was not proved beyond reasonable doubt."

At the hearing of the appeal, the appellant was represented by the above-named advocate, while the respondent had the services of Mr. Alex Mwita, the learned Senior State Attorney.

Mr. Mongo submitted in support of the first ground of appeal that, the main contentious issue is that summing up to assessors was not done

in accordance with the law. He contended that the learned trial Judge did not inform the assessors of their duties before commencing the trial. As such, he said, the assessors' participation was not in accordance with the law. He referred us to the record of appeal where the appointment of assessors was done by the learned trial Judge and immediately after their approval to sit in the trial, he called the first prosecution witness to testify before the court. Mr. Mongo cited the case of **Batram Nkwera @ Mhesa v. Republic,** Criminal Appeal No. 567 of 2019 (unreported) to back up his argument that, since the assessors were not informed of their responsibilities, their participation became meaningless and it is as good as that there was no participation of assessors during trial.

In the second limb of the first ground, it was Mr. Mongo's argument that the learned trial Judge failed to address the assessors on vital points of law; for instance, on what is circumstantial evidence and the principles governing it. Other principles which were relied upon by the learned trial Judge in the judgment but were not explained to the assessors, according to him, were corroborative evidence, retracted confession and defence of compulsion as apparent in the record of appeal. He submitted further that by failing to address the assessors on those vital points of law, the learned trial Judge contravened section 298 (1) of the Criminal Procedure Act [Cap

20 R.E. 2019 now R.E. 2022] (the CPA) with the effect of rendering the proceedings a nullity. He supported his averment with the decisions of the Court in **Batram Nkwera @ Mhesa** (supra); **Daniel Ramadhani Mkilindi @ Abdallah @ Dulla v. Republic,** Criminal Appeal No. 16 of 2019 and **Kinyota Kabwe v. Republic,** Criminal Appeal No. 198 of 2017 (both unreported).

Regarding the third limb of the first ground of appeal, Mr. Mongo submitted that when summing up to assessors, the learned trial Judge mentioned some of the things which were not part of the evidence which influenced the assessors in giving their respective opinion as it can be seen at pages 91, 95, 97, 98, 131 and 132 of the record of appeal. He further contended that it was wrong for the learned trial Judge to influenced the assessors as it was decided in the case of **Kinyota Kabwe** (supra). He thus urged us to find that the trial was not conducted in accordance with the law, hence, the whole proceedings is a nullity and that we should invoke section 4 (2) of the Appellate Jurisdiction Act, Cap 141 R.E. 2019 (the AJA) to quash the conviction and set aside the appellant's sentence.

Thereafter, he said, normally the Court would order a retrial under the circumstances; but in this case, ordering for a retrial will not be proper

due to the following reasons: **First,** as it is claimed in the second ground of appeal, there was procedural irregularity in admitting and relying on exhibit P5 to ground the conviction of the appellant. **Second,** the trial judge made reference to some facts in relation to exhibit P4 which are not on record. He insisted that the stated procedural irregularities prejudiced the appellant as miscarriage of justice was occasioned. **Third,** the evidence is insufficient to prove the case beyond reasonable doubt.

Finally, Mr. Mongo prayed that if the Court allows the first ground of appeal, it should quash the conviction and set aside the appellant's sentence with an order releasing him from the custody instead of ordering a retrial as it will not be in the interest of justice.

In reply, Mr. Mwita submitted that the trial Judge complied with the requirements of section 265 of the CPA as he set with assessors during trial. However, he said, the record is silent as to whether he informed them about their roles. Nevertheless, they participated fully in the trial as they got an opportunity to ask clarification questions to the witnesses and finally gave their opinion. Under the circumstance, he argued that the cases cited by Mr. Mongo are distinguishable from the present case.

Regarding the claim that the learned trial Judge did not address the assessors on vital points of law, Mr. Mwita partly concurred with the

submission by Mr. Mongo in this ground to the extent that, they were not sufficiently addressed on vital points of law involved. He however said, they were partly addressed on substance of evidence when he told them that nobody saw the appellant killing the deceased.

As regards extraneous matters introduced by the learned trial Judge during summing up to assessors, Mr. Mwita concurred with the submission by Mr. Mongo. He was very categorical that the learned trial Judge was wrong to rely on such matters to ground the appellant's conviction. He urged us to order for a retrial if we find that justice was not done to the appellant.

Responding to the second ground of appeal, Mr. Mwita stated that exhibits P4 and P5 were properly admitted and relied upon by the learned trial Judge to ground the appellant's conviction. With regard to the third ground of appeal, Mr. Mwita stated that the prosecution proved the case against the appellant beyond reasonable doubt despite the alleged procedural irregularities identified above. According to him, if the Court finds to the contrary, it should be taken that the said procedural irregularities were committed by the trial court in which case both parties were prejudiced. Therefore, it cannot be said with certainty that the prosecution did not discharge its duty properly to justify acquittal of the

appellant or an assertion that ordering a retrial may allow the prosecution to fill in evidential gaps. In the circumstances, he urged us to order for a retrial of the appellant for the interest of justice as he was firm that there is sufficient evidence on record to ground conviction.

Mr. Mongo made a very brief rejoinder insisting that the assessors were not addressed in accordance with the law during the trial, rendering the proceedings a nullity. However, he said, ordering a retrial will depend on our finding whether there is sufficient evidence on record to ground the appellant's conviction, otherwise, he urged us to allow the appeal and set the appellant free.

We have respectful considered submissions by the counsel for both sides, the grounds and record of appeal and we think, the main issue for our consideration in this appeal is whether the trial was conducted with the aid of assessors in accordance with the law. The participation of assessors in a trial is a matter of law as prescribed under section 265 of the CPA before the amendment by the Written Laws (Miscellaneous Amendment) Act No. 1 of 2022. It provided as follows:

> *"All trial before the High Court* ***shall be with the aid of assessors*** *the number of whom shall be two or more as the court thinks fit."*

[Emphasis added].

It can be deduced from the above provision that the phrase *"shall be with the aid of assessors"* entails full participation of assessors from the beginning to the end of trial. In other words, it means that having been duly selected and before commencement of a trial, the assessors must be full informed of their roles and responsibilities during the trial so as to offer a meaningful assistance to the presiding judge in deliberation of the issues emerging out of evidence in order to arrive at a just decision. The assessors' *aid* under the above provision can be achieved through their careful listening of the evidence; observation of various stages of the trial including, tendering and admission of exhibits; the clarification questions which they may put to the witnesses to clear uncertainties in evidence which can help them in grasping the summary of evidence as it may be made upon them by the presiding judge as required under section 298 (1) of the CPA; and finally, be in a good position to give their respective opinion on the case which will assist the presiding judge to fairly deliberate on issues arising from the case and hence, just decision.

In the current case, the record of appeal contains nothing showing that the assessors were informed of their duties after being appointed, as

correctly submitted by Mr. Mango. It can be gathered from the record of appeal as follows:

> "***Court:*** *Court assessors are selected namely:*
> 1. *Said Mbaga*
> 2. *Marla Mbetwa*
> 3. *Charles Kihika*
>
> *Accused is asked if he has any objection to any of the assessors.*
>
> ***Accused:*** *I have no any objection to assessors.*
>
> *Sgd.*
> ***JUDGE***
> *10/02/2020."*

What followed was for the prosecution case to be declared open and PW1 started to testify. However, it was the argument by Mr. Mwita that although the assessors were not informed of their duties after being selected, the trial judge gave them opportunity to ask questions to witnesses throughout the trial which means they participated in trial. We have thoroughly perused the record of appeal and we have no doubt that indeed, the assessors put questions to witnesses who testified during the trial. Notwithstanding this fact, we are of the considered opinion that still the learned trial Judge ought to have informed them of their duties as their participation in trial is not only confined to asking questions but the

entire anticipated aid in compliance with section 265 of the CPA as shown above. This was the initial task which was supposed to be performed by the learned trial Judge before assessors participated in trial to enable them appreciate the task ahead as stated by the Court in **Hilda Innocent v. Republic,** Criminal Appeal No. 181 of 2017 (unreported) referred in **Batram Mkwere @ Mhesa** (supra). Therefore, we find merit in the appellant's complaint in this aspect.

The other limb of complaint as far as participation of assessors is concerned in this case is that, the learned trial Judge did not fully comply with the requirements of section 298 (1) of the CPA which provides:

> *"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 intimated earlier, we had the opportunity to peruse the entire record of appeal; particularly, the summing up to assessors, the assessors' opinions and the judgment. We agree with the counsel for the parties that

the learned trial Judge introduced some of the information which was not part of the evidence. For instance, he relied on exhibit P4 to state that the appellant confessed to cooperate with Lizini his friend to kill the deceased which is not the case. By introducing facts which were not part of the evidence to the assessors, the learned trial Judge contravened the requirements of section 298 (1) of the CPA which requires him to summarize the evidence for the prosecution and defence before allowing the assessors to give their respective opinion.

We as well agree with the counsel for the parties that, the learned trial Judge did not sufficiently address the assessors on vital points of law which guided him in arriving at a decision he made. It is settled position that failure to address assessors on vital point of law is a misdirection which vitiates the trial. This position is stated in a number of decisions of the Court including, **Mathayo Wilfred and 2 Others v. Republic,** Criminal Appeal No. 294 of 2016 and **Christian Mwinuka v. Republic,** Criminal Appeal No. 263 of 2018 (both unreported). We intmated above that the appellant was charged with the offence of murder contrary to section 196 of the Penal Code. The said offence constitutes two ingredients; to wit, *actus reus* (the unlawful act) and means *rea* (the intention of doing a wrongful act) commonly referred to as *malice*

aforethought. As the entire evidence was circumstantial, in our opinion, it necessitated the need for the learned trial Judge to make thorough explanation on that vital point of law to the assessors for them to give their respective rational opinion for their opinion depended on any specific question of fact addressed to them by the judge in terms section 298 (1) of the CPA as quoted above.

In the case at hand, it is apparent as per the record of appeal that the learned trial Judge did not go further to explain to them under what circumstances such an evidence can be admitted and relied upon by the court to ground conviction. In our settled view, it was not enough for the learned Judge to tell the assessors that such evidence is admissible without elaborating as to how the said evidence can be connected to the offence the appellant was charged with and the standard required to establish the *actus reus* and *malice aforethough* or otherwise of the accused person for them to be in a position to apply those principles *viz a viz* the available evidence.

Moreover, as correctly conceded by the counsel for the parties, we are satisfied that the learned trial Judge did not explain to the assessors matters concerning common intention, retracted confession,

corroborative evidence and the doctrine of last person to be seen with the deceased, though he discussed and relied on them to ground conviction.

In the light of the above highlighted shortcomings, we entertain no doubt that the purported summing up to assessors conducted by the learned trial Judge was insufficient contrary to the requirements of section 298 (1) of the CPA and it as well impaired the assessors' participation during trial in contravention of section 265 of the CPA, hence, the trial was vitiated.

As to what is the way forward, counsel for the parties parted their ways. On one hand, Mr. Mongo was of the view that there is no sufficient evidence on the record of appeal against the appellant to prove beyond reasonable doubt the prosecution case and thus, the Court should not order for a retrial. To the contrary, Mr. Mwita had a view that the prosecution has sufficient evidence to prove the case to the required standard and thus the way forward should be for the Court to order for a retrial.

On our part, having weighed out the rival arguments by the counsel for the parties amid the factual setting of the case in the record of appeal, without prejudice, we think, the interest of justice demands that we order for a retrial.

In the upshot and on the strength of the first ground of appeal, we allow the appeal, nullify the proceedings, quash the conviction and set aside the appellant's sentence. In lieu thereof, we order for a retrial of the appellant before another Judge in accordance with the current requirements of law in respect of the involvement of assessors as stipulated under section 265 (1) of the CPA. In the meantime, the appellant shall remain in custody pending retrial.

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

This Judgment delivered this 31st day of October, 2022 in the presence of Mr. Jally Mongo, the learned counsel for the Appellant and Mr. Yahaya Misango, State Attorney for the Respondent, is hereby certified as a true copy of the original.

J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL