IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

CRIMINAL APPEAL NO. 448 OF 2018

(CORAM: KOROSSO, J.A., GALEBA, J.A. And MWAMPASHI, J.A.)

MWANDU ABEDI.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the decision of the High Court of Tanzania, at Tabora)

(Mruma, J)

dated the 26th day of June, 2014

in

Criminal Sessions Case No. 60 of 2008

.....

JUDGMENT OF THE COURT

25th & 31st October, 2022

MWAMPASHI, J.A.:

In the High Court of Tanzania at Tabora sitting at Shinyanga, the appellant Mwandu s/o Abedi was arraigned and convicted of murder c/s 196 of the Penal Code [Cap. 16 R.E. 2002; now 2022] (the Penal Code). It was alleged in the information levied against him that on 15.03.2008 at about 11.30 hours at Bubinza Village within the District of Kishapu in Shinyanga Region, he murdered one Mungo s/o Tungu (the deceased). Upon conviction, the appellant was handed down the mandatory death sentence by hanging hence the instant appeal against both the conviction and sentence.

In proving the offence, the prosecution paraded a total of four (4) witnesses and produced two (2) exhibits. On the defence side, the appellant was a sole witness. The star witness for the prosecution was the

appellant's wife, one Leah d/o Njile Gabriel who testified as PW1. According to her, on the material day, that is on 15.03.2008, at about 11:00 hours she and her sister- in-law, one Ester, were on their way to the flour milling machine when they met the appellant, who had not been at home for some days, heading home while in the company of the deceased. On returning home at around 13:00 hours, they found the appellant busy cleaning blood which had been scattered all over the floor and walls. When asked, the appellant said he had killed a mad dog. Few minutes later, the appellant picked a hoe and went at the backyard. When he came back, he did not stay, he quickly left saying that he was going to bandage a wound he had sustained while repairing a radio. After the appellant had left, PW1 and her sister-in-law, curiously went at the backyard where they found the deceased body covered by grasses and soil. PW1 reported the incident to her mother-in-law who did however, warn and ask her and the sister-in-law to keep silent. PW1 heeded the warning till on 20.03.2008 when, upon being faced and interrogated by the Sungusungu leader one Mohammed Shamte Mwinamila (PW2), she disclosed the secret.

The deceased's father one Tungo Mandago Ngusa testified as PW3 telling the trial court that on 16.03.2008, he was informed that his son, the deceased, who had gone to Bubinza Village, was missing. As on 19.03.2008 the deceased was still missing, he reported the incident to PW2 who mounted investigations. On 20.03.2008 PW3 was informed that

the deceased body had been found at Bubinza Village and when he got there on 21.03.2008, he saw the remains of the deceased. PW2's evidence was simply that after the missing of the deceased had been reported to him, he commenced investigations that led to the information that the deceased had been killed by the appellant. Upon getting at the appellant's home on 20.03.2008, the appellant's wife, PW1, confirmed that indeed it was the appellant who had murdered the deceased. PW1 did also lead them to where the deceased body was.

Assistant Inspector Wilbert Andrew Sichone testified as PW4. His testimony was to the effect that at the material time he was stationed at Kishapu Police Station and further that on 21.03.2008 at about 07:00 hours he accompanied the OC-CID Gervas Kundya to Bubinza Village where a murder had been committed. When they got at Bubinza they proceeded to the appellant's house where many people had already gathered. In the house they saw blood clots on the floor. They were then led to a nearby farm where they found some parts of the human being, bones, a dark jacket, a pair of shorts and a green pair of trousers. PW4 further testified that on 26.03.2008 he picked the appellant from Shinyanga Central Police Station where he was being held to Kishapu Police Station. At Kishapu, he recorded the appellant's cautioned statement which was later tendered and admitted in evidence without any objection as exhibit P. II.

In his defence the appellant maintained that he did not commit the murder in question. He claimed that on the material date he was not at home as he had gone to visit his brother-in-law at Singita Village in Tinde where he stayed until on 26.03.2008, when he left for Shinyanga. While at Shinyanga he visited his sick relative who was admitted at the Region Hospital and while at a certain restaurant three police officers arrested and then locked him at Shinyanga Police Station.

Basing on the above evidence, the trial court concurred with the unanimous opinion of the three assessors, that the appellant was guilty of the offence in question. In its judgment, the trial court made a finding that the prosecution case rested on circumstantial evidence. It also found that the said evidence was watertight irresistibly pointing to no other person but the appellant as the one responsible for the death of the deceased. Further, the appellant's defence of *alibi* which had been raised without the required notice, was accorded no weight and rejected. The trial court did also base the conviction on the cautioned statement (exhibit P II) as well as on the doctrine of the last person to be seen with the deceased alive.

Initially, a memorandum of appeal containing four grounds of appeal had been lodged by the appellant on 09.03.2021. However, at the hearing of this appeal, Ms. Stella Thomas Nyakyi, learned advocate, for the appellant, having consulted the appellant, decided to abandon the initial memorandum of appeal and substituted it by a supplementary

memorandum of appeal which Ms. Nyakyi herself had lodged on 20.10.2022, in terms of rule 73 (2) of the Tanzania Court of Appeal Rules, 2009 (the Rules), which is comprised of the following two grounds:

1. That the learned trial Judge erred in law, in convicting the appellant basing on the cautioned statement which was made contrary to section 57 (3) of the Criminal Procedure Act, Chapter 20 R.E. 2022.

2. That, the learned trial Judge erred in law, in convicting the appellant basing on insufficient circumstantial evidence.

When invited to argue the two grounds of appeal, Ms. Nyakyi began with the first ground on the complaint that the cautioned statement on which the trial court based the conviction ought not, in the first place, to have been tendered and admitted in evidence because it was taken in contravention of section 57 (3) of the Criminal Procedure Act, Cap 20 R.E. 2022 (the CPA). In the course of her submissions on this ground, Ms. Nyakyi did also contend that in his summing up notes to the assessors the learned trial Judge did not address and explain to the assessors, the nature and the evidential value of the said cautioned statement hence rendering it inadequate.

At this point, the Court, for purposes of satisfying itself on the propriety or otherwise of the summing up to the assessors, prompted the counsel for the parties, particularly to Ms. Nyakyi, to address us on

whether the failure by the trial court to address the assessors on the cautioned statement as pointed out by her, was the only ailment the summing up notes suffered.

Responding to the above query by the Court, Ms. Nyakyi was quick to point out that the summing up notes suffered more serious ailments. She pointed out that the assessors were also not directed on other vital points of law involved in the case. She argued that there was no direction and explanation to the assessors on circumstantial evidence, the defence of alibi and the doctrine of the last person to be seen with the deceased. As to what should be the way forward, it was Ms. Nyakyi's stand that since failure to address assessors on vital points involved in a case is an irregularity which is fatal and as there is no enough evidence in support of the charge, then a retrial should not be ordered. She insisted that under the circumstances of this case the appellant should be released.

On the other side, Mr. Omar Abdallah Kibwanah, learned Senior State Attorney, who was being assisted by Ms. Lucy Enock Kyusa, learned State Attorney, appearing for the respondent Republic, readily conceded that the summing up notes was wanting because the learned trial Judge did not address and explain to the assessors the salient points of law involved as pointed by Ms. Nyakyi. He also agreed that the irregularity is fatal. Mr. Kibwanah did also add that even the role the assessors were expected to play in the trial was not explained to them by the learned trial Judge at the beginning of the trial. As on the way forward, it was his view

that considering the circumstances of the case, it will be in the interests of justice if the case is remitted to the learned trial Judge for a fresh summing up to assessors and judgment. He insisted that though ordinarily retrial would have been ordered, in the circumstances of this case where the ailment is on the summing up to assessors and where the evidence on record sufficiently proves the offence in question, the Court should only nullify the proceedings from the stage of summing up, quash the High Court judgment and order a fresh summing up and judgment to be prepared rather than releasing the appellant as prayed by Ms. Nyakyi.

In her short rejoinder, Ms. Nyakyi reiterated her earlier stance that the inadequate and insufficient summing up renders the whole trial erroneous and that since according to the evidence on record, no conviction can be found on such evidence, then there is no need for a fresh summing up but that the appellant has to be released.

Before we proceed any further, we should perhaps point out at this very stage that, in our considered view and under the circumstances of this case, the wanting sum up to the assessors by the learned trial Judge suffices to dispose of the appeal because the ailment goes to the contravention of sections 298 and 265 of the CPA rendering the trial to have been conducted without the aid of the assessors as required by the law. It is for that reason, that we have also found no need of recapitulating the whole of the submissions made for and against the grounds of appeal.

The issue for our consideration is therefore on the validity of the trial and the resultant conviction and sentence, not only on account of the summing up to the assessors but also on account of the failure by the learned trial Judge to explain to the assessors of their roles and duties at the beginning of the trial.

Before the amendments of the CPA and the repeal and replacement of section 265 by the Written Laws (Miscellaneous Amendments) Act, 2022, the involvement and participation of assessors in all criminal trials before the High Court with the aid of assessors was a mandatory requirement. Any trial conducted in contravention of the said provision was a nullity. The true meaning and purpose of section 265 was elaborated by the Court in **Lazaro Katende v. The Director of Public Prosecutions**, Criminal Appeal No. 146 of 2018 (unreported) thus:

> *"It is also pertinent to state here that it is trite law that section 265 of the CPA does not merely mean the presence of assessors during the trial. It means far more than that, that is to say; their selection, their participation in the trial by putting questions to the witnesses for clarification and giving their opinions after the trial Judge's summing up to them pursuance of section 298 (1) of the CPA. Trite law has it that violation of any of the above aspects is tantamount to the trial being conducted without the aid of assessors rendering it a nullity regardless of their physical presence throughout the trial".*

It is trite position, as also rightly argued by the counsel for the parties, that the requirement for the trial court to direct the assessors on vital points of law in summing up, is a mandatory duty. In **Masolwa Samwel v. Republic**, Criminal Appeal No. 206 of 2014 (unreported), the Court insisted that:

> *"There is a long unbroken chain of decisions of this Court which all underscore the duty imposed on trial High Court Judges who sit with the aid of assessors to sum up adequately to those assessors on all vital points of law...".*

It is also trite law that the omission to direct the assessors on vital points of law is a fatal irregularity which vitiates the trial and which cannot be saved by the provisions of section 388 of the CPA. See- **Tulibuzya Bituro v. Republic** [1982] T.L.R. 265, **Said Mshangama @ Senga v. Republic,** Criminal Appeal No. 08 of 2014, **Omar Katesi v. Republic,** Criminal Appeal No. 508 of 2017 and **Msigwa Matonya and 4 Others v. Republic,** Criminal Appeal No. 492 of 2020 (all unreported). In **Said Mshangama @ Senga** (supra), the Court stated that:

> *"Where there is inadequate summing up, non-direction or omission 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".*

In the instant case, there is no dispute that in his 12 pages summing up notes, at pages 48 to 59 of the record of appeal, the learned trial Judge did not, with respect, direct the assessors on vital points of law involved. First of all, while it was clear, as it was also noted by the learned trial Judge in his judgment, that the determination of the case rested on circumstantial evidence, the learned trial Judge did not appraise and explain to the assessors, in the summing up notes, the nature and application of such evidence. Again, although in arriving at its decision the trial court relied on the cautioned statement (exhibit P II), the assessors were not informed of the nature of such evidence and the conditions under which the evidence may be acted upon to found conviction.

Further, while it is clear from the record that in his defence, the appellant raised a defence of *alibi*, that on the day the murder in question was committed he was at Singita Village in Tinde where he had gone to visit his brother-in-law, the assessors were not directed on the nature and application of such a defence. The other vital point which the learned trial Judge omitted to address the assessors in his summing up notes and which did also form the basis of the conviction, is the doctrine of the person last seen with the deceased.

Apart from the above pointed out irregularities in regard to the summing up, the learned trial Judge also did not inform the assessors of their role and duties at the commencement of the trial. The record is clear at pages 18 and 19 of the record of appeal that after the assessors'

selection and clearance to sit with the learned trial Judge and before the prosecution opened its case by fielding its first witness, the assessors were not informed of their role and duties. It is trite law that failure to do so is a fatal irregularity which diminishes the assessors' level of participation and renders their participation which is a requirement of law, meaningless. See- **Hilda Innocent v. Republic,** Criminal Appeal No. 181 of 2017 and **Fadhil Yussuf Hamid v. Republic**, Criminal Appeal No. 129 of 2016 (both unreported).

From the foregoing, we are therefore settled in our mind that the trial was vitiated by the above pointed out irregularities hence rendering the same a nullity. As on what should be the way forward, we have dispassionately heard and considered the invitations extended to us by the counsel for the parties. We however, decline to accept any of the invitation. We are of a considered view that under the circumstances of this case where the ailment is not only on the summing up aspect but also on the failure by the learned trial Judge to inform the assessors of their role and duties before the commencement of the prosecution case, the right course is for the nullification of the whole trial. In reaching at this decision, we have also considered the nature of the offence and the interests of justice.

For the above given reasons, we therefore nullify the trial proceedings from immediately after the preliminary hearing, quash the judgment and conviction and set aside the sentence imposed on the

appellant. Consequently, we order that the case be expeditiously retried before another judge in accordance with the current relevant law particularly on participation of assessors. Meanwhile, the appellant shall remain in custody pending his retrial.

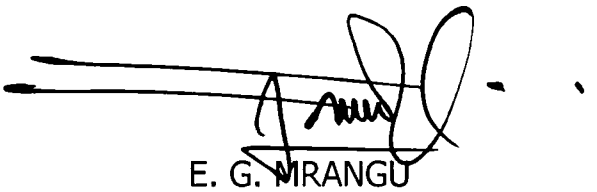
DATED at **TABORA** this 29th day of October, 2022.

W. B. KOROSSO
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The Judgment delivered this 31st day of October, 2022 in the presence of the appellant who was represented by Ms. Stella Nyakyi, learned counsel and Ms. Sabina Silayo, learned State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.



E. G. MRANGU
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL