IN THE COURT OF APPEAL OF TANZANIA

AT IRINGA

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

CRIMINAL APPEAL NO. 173 OF 2020

NURU MANGULA ..... 1ST APPELLANT

SEDEKI MLIGULA ..... 2ND APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from decision of the High Court of Tanzania Iringa District Registry at Njombe)

(Kente, J.)

Dated the 12th day of March, 2020

in

Criminal Sessions Case No. 94 of 2016

JUDGMENT OF THE COURT

28th October, & 4th November, 2022

WAMBALI, J.A.:

On 12th March, 2020, the High Court of Tanzania Iringa District Registry sitting at Njombe, delivered its decision in Criminal Sessions Case No. 94 of 2016. In that decision, the appellants, Nuru Mangula and Sedeki Mlugula (the first and second appellants respectively), who were jointly and together charged with two counts of murder, contrary to section 196 of the Penal Code [Cap. 16 R.E. 2002, now R.E. 2022] (the Penal Code), were convicted after being found guilty as charged.

It was plainly alleged in the particulars in respect of the first count that on 30th September, 2014 at Sovi Village within the District and Region of Njombe, the appellant jointly and together murdered one Yusta Ndundulu. It was similarly alleged in respect of the second count that on the same date and place, the appellants jointly and together murdered one Emmanuel Mangula.

The prosecution case found support of seven witnesses and seven exhibits. Briefly, it was the prosecution case that Yusta Ndundulu and Emmanuel Mangula who were mother and son respectively, met a violent death after they were severely beaten up on their heads with a sharp object. The postmortem examination report in respect of Yusta Ndundulu revealed that the death of the deceased was caused by a severe head injury due to penetration of a sharp object. It was similarly established by another examination report that Emmanuel Mangula's death was due to severe head injury. It was thus the substance of the prosecution evidence that the appellants who previously had sexual relationship with Yusta on different occasions, were fully responsible for her death and that of Emmanuel Mangula who also happened to be the son of the first appellant.

In his spirited defence, though the first appellant admitted having known the late Yusta Ndundulu as his former lover, he categorically denied to have been responsible for her murder. Besides, he did not state anything in connection of the allegation of murdering his son, the late Emmanuel Mangula.

Similarly, the second appellant who defended himself against the allegation, denied to have been involved in murdering the late Yusta Ndundulu and Emmanuel Mangula as alleged in the two counts contained in the information.

As it were, at the height of the trial, the trial judge was satisfied with the prosecution story and disbelieved the defences of the appellants. He thus found them guilty in respect of both counts, convicted them as intimated above, and sentenced each to death by hanging in terms of section 197 of the Penal Code.

It is the trial court's finding that has prompted this joint appeal by the appellants. It is noteworthy that initially, on 29th July, 2021, the appellants lodged a joint memorandum of appeal comprising of seven grounds of appeal. However, upon being assigned to represent the appellants, Mr. Jally Willy Mongo, learned advocate who also appeared at the hearing, lodged a substituted memorandum of appeal pursuant to

rule 73 (2) of the Tanzania Court of Appeal Rules, 2009 containing the following three grounds of appeal:

> *"1. The honourable judge erred in law and fact in failing to sum-up properly the case to assessors.*
>
> *2. The honourable judge erred in law and fact in:-*
>
> *(i) Admitting and or relying upon exhibit P2 (2nd appellant's cautioned statement) in convicting the appellant.*
>
> *3. That, from the evidence on record, the honourable judge erred in law and fact in convicting the appellants with the offence of murder while the case was not proved beyond reasonable doubt."*

Submitting in support of the first ground of appeal, Mr. Mongo argued that the participation of assessors during the trial was not optimal. This is because, he contended, the purported summing up made by the trial judge to assessors contravened the provisions of section 298 (1) of the Criminal Procedure Act [Cap. 20 R.E. 2002, now R.E. 2022] (the CPA). He argued that the thrust of his contention is based on the following reasons. **Firstly**, in his summing up notes, the trial judge did not at all sum-up the substance of the evidence of both

the prosecution and the defence as required by the law to enable assessors appreciate the facts of the case before he required them to state their opinions as to the case generally and any specific question of facts revealed by him. On the contrary, he submitted, the trial judge wrote some headings of the matters which he needed to explain to the assessors. Nonetheless, he submitted that according to the record of appeal, there is no evidence on record that he made explanation as required by law to enable assessors to give informed opinions.

Secondly, the trial judge did not explain to the assessors vital points of the case which he ultimately discussed in his judgment and relied on them to ground the convictions of the appellants. Specifically, he mentioned the vital points to include; the ingredients of the offence of murder and the burden of proof, circumstantial evidence and its legal implication, retracted confession of the second appellant and its evidential value, corroboration evidence and accomplice evidence.

In his submission, the omission of the trial judge to comply with the mandatory requirement of the law, rendered the trial to have been conducted without the aid of assessors who are supposed to be part and parcel of the trial as required by the then section 265 of the CPA. He submitted further that though the record of appeal shows that they

stated their opinions, the same were not based on their thorough understanding of the facts of the case and the relevant specific questions of law which the trial judge relied in his judgment to ground the convictions of the appellants. To support his submission, he made reference to the decision of the Court in **Kinyota Kabwe v. The Republic**, Criminal Appeal No. 198 of 2017 (unreported).

Mr. Mongo concluded his submission in respect of the first ground of appeal by arguing that the omission of the trial judge vitiated the proceedings of the trial court and rendered them a nullity. In the circumstances, he prayed that as the omission is fatal, the respective proceedings be nullified, convictions quashed and sentences imposed on the appellants be set aside.

Nevertheless, he submitted that, though ordinarily after the Court nullifies the trial court's proceedings for procedural irregularities, the possible option is to order a retrial, that should not be the case in the case at hand. He argued that a retrial will prejudice the appellants since the prosecution case is weak. He maintained that the crucial piece of evidence, that is, the cautioned statement of the second appellant which was retracted was wrongly admitted and relied upon by the trial judge to ground the appellants' convictions. He thus submitted that if the said

confession is disregarded, the remaining evidence on record will not be sufficient to prove the offence of murder against the appellants. In the result, he implored us to order the immediate release of the appellants from custody as a retrial will cause miscarriage of justice on their part.

On the adversary side, Ms. Hope Charles Massambu, learned State Attorney, who appeared for the respondent Republic, outrightly supported the appellants' appeal on this ground. She associated herself with the submissions by Mr. Mongo with regard to the omission of the trial judge to comply with the provisions of section 298 (1) of the CPA. She supplemented her submission by arguing that, considering the nature of the offence and the improper summing up to the assessors who aided the trial judge, the trial was rendered a nullity. She was firm that the opinion which assessors stated after the purported summing up was not borne from their understanding of the facts of the case on record and the address of the trial judge as required by the law. She buttressed her arguments by reference to the decision in **Simitu Haruna @ Magezi v. The Republic**, Criminal Appeal No. 429 of 2018 (unreported). She therefore, joined hands with Mr. Mongo to pray that the trial court's proceedings be nullified, convictions quashed and sentences be set aside because the omission occasioned failure of justice.

Nonetheless, the learned State Attorney drastically differed with Mr. Mongo's prayer for the release of the appellants from custody on account of insufficiency of evidence to support the prosecution case. On her part, she was of the firm opinion that having regard the material on record and the circumstances of the case at hand, a retrial will be in the interest of justice. She maintained that in view of the evidence on record, the prosecution will not utilize the opportunity to fill in the gaps as argued by the appellants' advocate.

Having heard the concurrent submissions of counsel for the parties in support of this ground of appeal, and thoroughly scrutinized the record of appeal, we entirely agree that the trial judge's summing up to assessors was not in conformity with the requirement of section 298 (1) of the CPA.

It is acknowledged that the main purpose of summing up to assessors who are bound to assist the trial judge during the trial as provided under section 265 of the CPA before the current amendment by the Written Laws (Miscellaneous Amendments) Act, No. 1 of 2022, was to enable them to have a thorough understanding of the facts of the case and thereby arrive at an informed opinions on the fate of the accused. The assessors opinions, therefore, can only be of great value

to the trial judge if he has summed up the case properly to enable them understand the facts in relation to the law. For this stance, see for instance, **Washington s/o Odindo v. R** (1954) 21 EACA 392 in which references have been made in several decisions of the Court including, **Augustino Lodaru v. The Republic**, Criminal Appeal No. 70 of 2010, **Charles Lyatii @ Sakala v. The Republic**, Criminal Appeal No. 290 of 2011, **Mbalushimana Jean-Marie Vienney @ Mtokambali v. The Republic**, Criminal Appeal No. 102 of 2016 (all unreported) and **Samitu Haruna @ Magezi v. The Republic** (supra), to mention but a few.

We are aware that in summing up to assessors, the trial judge is not required to reproduce the entire evidence for both sides of the case. However, it is a requirement of the law that the trial judge must sum up the substance of the prosecution and the defence case and also bring to the attention of the assessors any vital points of the case in relation to the facts of the case which he intends to rely in deciding the fate of the accused. At this juncture, we find it pertinent to reiterate what the Court stated in **Hatibu Ghandi and Others v. The Republic** [1996] T.L.R. 12 at page 32:

> *"We do not think a trial judge is required to state all details of the case in his summing up. If he*

does so, it would cease to be a summing up. ***It is sufficient if he states the substance or gist of the case on both sides in a manner which enables the assessors to give their opinions on the case in general, and in any particular point that the trial judge needs their opinions."***

[See also **Masolwa Samwel v. The Republic**, Criminal Appeal No. 206 of 2014 (unreported)].

The summing up of the trial judge to the assessors, therefore, must be adequate with regard to the facts and vital points which the trial judge needs the assessors opinion, regardless of the style he adopts. Proper summing up aims to ensure that assessors have a thorough understanding of the facts of the case and any specific matters in the case before they state their opinion. The summing up notes thus should be in writing and be apparent on the record of proceedings.

Reverting to the case at hand, according to the record of appeal, with profound respect, we entertain no doubt that the trial judge did not properly sum-up the case to the assessors as required by the law.

On the contrary, he simply outlined the headings of the matters which he had intended to explain to the assessors and thereafter he required them to state their opinions. Guided by the record of appeal,

we are not sure as to whether despite lack of the summary of the evidence for both sides, he explained the points he had indicated on each heading as the record is silent. In any case, oral explanation would not suffice compliance with section 298 (1) of the CPA. In **Bashir Rashid Omar v. SMZ**, Criminal Appeal No. 83 of 2009 (unreported), the Court held among others that:

> *"...The trial judge ought to have shown in the record the following:*
>
> *1. The summary of the facts of the case.*
>
> *2. The evidence adduced.*
>
> *3. Explanation of the law e.g. the ingredients of the offence, malice aforethought etc.*
>
> *4. Any possible defence and the law regarding the defence."*

Noteworthy, in that case, the Court was confronted with a situation in which the trial judge simply indicated in the record that the provision of the CPA was complied with without having put in writing in the record of proceedings the summing up notes to the assessors.

More particularly, confronted with an akin situation, in **Benito Makombe v. The Republic**, Criminal Appeal No. 440 of 2019 (unreported), the Court stated:

> *"... What is vivid is that the trial judge listed headings of the matters which needed to be explained to the assessors but short of explaining them. Not even the evidence for both sides was summarized to the assessors."*

The Court then concluded that:

> *"...failure by the trial judge to properly sum up the case denied the assessors to fully give fair opinion. The inadequately summing up to the assessors vitiated the whole proceedings."*

Similarly, in the case at hand, from the foregoing deliberation, and considering the nature of the omission, we are settled that the entire proceedings are vitiated. In the event, we allow the first ground of appeal.

As to the way forward, we are alive to the contending positions of the counsel for the parties on the proper order to be made by the Court. Nevertheless, considering the fact that the omission is fatal which indeed occasioned injustice to both sides, and weighing the factual setting of the material on record, we are of the settled view that it will be in the interest of justice if a retrial is ordered. In the event, as the first ground disposes off the appeal, we do not intend to determine the remaining ground of appeal. We therefore allow the appeal.

Consequently, we nullify the proceedings, quash convictions and set aside the sentences imposed on the appellants. Ultimately, we order an expedited retrial which should be conducted before another judge in accordance with the current requirement of the provisions of section 265 (1) of the CPA with regard to the involvement of assessors. We further order that the appellants should remain in custody pending retrial.

DATED at **IRINGA** this 3rd day of November, 2022.

F. L. K. WAMBALI
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

The Judgment delivered this 4th day of November, 2022 in the presence of Mr. Jally Mongo, learned counsel for the appellants and Mr. Alex Mwita, learned Senior State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.

J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL