IN THE COURT OF APPEAL OF TANZANIA

AT IRINGA

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

CRIMINAL APPEAL NO. 272 OF 2020

YOHANA MTITU @ KAYANDA .... APPELLANT

VERSUS

THE REPUBLIC... RESPONDENT

[Appeal from the Decision of the High Court of Tanzania Iringa District Registry at Njombe]

(Kente, J.)

Dated the 20th day of March, 2020
in
Criminal Sessions Case No. 38 of 2016

....

JUDGMENT OF THE COURT

2nd & 4th November 2022

WAMBALI, J.A.:

The appellant, Yohana Mtitu @ Kayanda has preferred the instant appeal to contest the findings of the High Court of Tanzania Iringa District Registry sitting at Njombe which lead to his conviction of the offence of murder contrary to section 196 of the Penal Code [Cap 16 R.E. 2022, now RE. 2022], (the Penal Code). It is plainly indicated in the record of appeal that the allegation contained in the information placed before the trial court was to the effect that on 11th March, 2014 at Oryx Filling Station – Makambako Township within the District and Region of Njombe, the

appellant did murder one Winfred s/o Maliga. The appellant denied the charge, hence his trial commenced on 3rd October, 2019. The prosecution side marshalled six witnesses and tendered seven documentary exhibits to support its case.

The substance of the prosecution case is to the effect that, Winfred Maliga, the deceased who was employed by Oryx Company as a pump attendant and worked at Makambako Filling Station, died a violent death on 11th March, 2014 after he was short close to the eye. It is indicated in the postmortem examination report which was tendered and admitted during the trial as exhibit P5 that, the decease's death was due to head injury secondary to internal bleeding. Noteworthy, huge wound at the right eye and another penetrating wound at the occipital were noted during the examination. It is on record that on the incident date, while at work place, the deceased was robbed of the fuel sale-proceeds and ultimately killed in the process.

As it were, the appellant was suspected immediately being among those responsible of the death of the deceased because according to the evidence on record, he was one of the two security guards employed by New Imara Security Company and was alleged to have been on duty on

the material day but went missing immediately after the deceased's murder. He was however subsequently traced and arrested on the same day at Kingaga village in Mbarali District in Mbeya Region. It was also the prosecution evidence that the appellant was responsible for the murder of the deceased as he allegedly confessed in a statement made to detective Sargent Andrew (PW5). Following the alleged confession, the prosecution side was content that the appellant readily admitted to have brutally shot the deceased dead and stole the money which the deceased had collected as proceeds of fuel sales. It was testified further that, the said piece of evidence was supported by other prosecution witnesses' evidence on record.

For his part, the appellant categorically disassociated himself with the allegation. He stated that on the material date, he was not at the scene of crime as he was at Kangaga village where he was arrested by the members of the people militia and sent to Makambako Police Station, and that by then, he had terminated his employment contract as a security guard. He also denied to have confessed to commit the offence of murder as alleged by the prosecution and termed the cautioned statement as concocted evidence by PW5.

Be that as it may, at the end of the trial, the trial judge formed an opinion that the prosecution case was proved to the required standard. He thus convicted the appellant as intimated above, and subsequently sentenced him to death by hanging, in terms of section 197 of the Penal Code.

Dissatisfied, he initially approached the Court through a memorandum of appeal composed of six grounds of appeal lodged on 24th December, 2020. However, before the hearing of the appeal, the appellant was assigned a counsel to represent him, who in terms of rule 73 (2) of the Tanzania Court of Appeal Rules, 2009, lodged a substituted memorandum of appeal containing three grounds of appeal couched in the following terms:

> *"1. The honourable judge erred in law and fact in failing to sum up properly the case to the assessors.*
>
> *2. The honourable judge erred in law and fact in admitting and or relying upon exhibit P6 (the appellant's cautioned statement) in convicting him.*
>
> *3. That, from the evidence on 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."

The hearing of the appeal proceeded in the presence of the appellant in person being represented by Mr. Jally Willy Mongo, learned advocate, and Mr. Tito Ambangile Mwakalinga, learned State Attorney for the respondent Republic.

It was forcefully argued for the appellant by Mr. Mongo in support of the first ground of appeal that, the trial judge did not sum up the substance of the evidence of both the prosecution and the defence as required by the provisions of section 298 (1) of the Criminal Procedure Act [Cap 20 R.E. 2022]. He submitted that, it is apparent in the record of appeal that the trial judge itemized the matters which he presumably summed up to the assessors without explanation. He submitted further that as the record of the court is taken to reflect what transpired during the trial, it cannot be stated that there is any other detailed summing up notes other than those reflected in the record of appeal.

He emphasized that it is a requirement of the law that during the summing up, the trial judge must reveal to the assessors vital points in relation to the facts of the case and the law. Unfortunately, he stated, in

the present case, despite the fact that the trial judge itemized the issue of circumstancial evidence in one of the headings in the summing up notes without explanation, he did not bring to the attention of assessors the vital points of law which he later substantially discussed in his judgment and relied upon in finding the appellant guilty as charged. Particularly, he mentioned and explained the said vital points to include; the ingredients of the offence of murder, burden of proof, circumstantial evidence, retracted confession, defence of alibi and the doctrine of the last person to be seen with the deceased.

The learned advocate was thus of the opinion that the omission of the trial judge to comply with the provisions of section 298 (1) of the CPA is fatal as the trial is deemed to have not been with the assistance of the assessors whom section 265 of the CPA recognizes as important partners of the trial judge during the trial. To reinforce his submission, he referred us to the decision in **Kinyota Kabwe v. The Republic,** Criminal Appeal No. 198 of 2017 (unreported).

In the circumstances, Mr.Mongo prayed that as the trial was rendered a nullity, we should nullify the entire proceedings, quash conviction and set aside the sentence imposed on the appellant.

On the other hand, Mr. Mongo submitted that though the nullification of the proceedings on account of omission of the trial court occassionally leads to a retrial, in the case at hand, the appellant deserves to be released from custody. The thrust of his submission was backed by the contention that the prosecution evidence on record is insufficient to sustain the appellant's conviction. He argued that the cautioned statement of the appellant, which was heavily relied by the trial judge to ground conviction of the appellant was wrongly admitted and thus its value is wanting. In the event, he submitted that if the cautioned statement is disregarded, there is no credible evidence on record to support the prosecution case. He concluded his submission by asserting that considering the circumstances of the case at hand, a retrial will not be in the interest of justice as it will occasion failure of justice.

Mr. Mongo's submission with regard to the omission of the trial judge to comply with the requirement of the law in the summing up to assessors was fully supported by Mr. Mwakalinga for the respondent Republic. He unreservedly agreed that as the omission is incurable, the entire trial court's proceedings be nullified, conviction quashed and sentence set aside. However, he was firm that the proposal by Mr. Mongo that the appellant be released is not in the interest of justice as both sides

of the case were prejudiced by the trial court's omission. Besides, he argued, a careful scrutiny of the facts of the case on record indicates that the prosecution side has sufficient evidence to convince the trial court to find the allegation against the appellant justifiable. He, therefore, concluded his submission by urging us to order a retrial before another judge in accordance with the current setting of the provisions of section 265 (1) of the CPA.

Our close scrutiny of the record of appeal compels us to agree with the counsel for the parties that the itemized summing up notes to assessors prepared by the trial judge in which some issues and points were listed with no visible evidence of the summary of the substance of the facts of the case is not in conformity with the requirement stipulated under section 298 (1) of the CPA.

With profound respect, we are of the view that the style adopted by the trial judge, cannot assist the Court to be in a position to say what he exactly told the assessors during the summing up. Indeed, it cannot enable us to state with certainty whether the trial judge sufficiently summed up the case to the assessors by explaining fully the facts of the case before them in relation to the vital points and the relevant law.

It must be appreciated that proper summing up notes not only enables the assessors to have an understating of the facts of the case before they state their opinions, but it also enables the first appellate court, as is the case here, to appreciate the information revealed to the assessors and how the same have featured in the judgment and relied upon in determining the case.

In **Laurent Salu and Five Others v. The Republic**, Criminal Appeal No. 176 of 1993 (unreported), among other matters, the Court held that:

> *"The court has to sum up to the assessors at the end of submission by both sides. The summing up to contain a summary of facts, the evidence adduced and also the explanation of the relevant law, for instance, what is malice aforethought. The court has to point out to the assessors any possible defence and explain to them the law regarding those defences."*

Moreover, in **Michael Maige v. The Republic,** Criminal Appeal No. 153 of 2017 (unreported) it was emphasized that:

> *"...the issue of summing up to assessors is a requirement of law that for the trial judge who sits*

with the aid of assessors has to sum up to them before inviting their opinion as the main purpose is to enable them to arrive at a correct opinion and the same can be of great value to the trial judge only if they understand the facts of the case in relation to the relevant law. (See ***Washington s/o Odindo v. Republic*** *(1954) 21 EACA 392;* ***Augustino Lodami v. Republic,*** *Criminal Appeal No. 70 of 2010;* ***Charles Lyatii @ Sadala v. Republic,*** *Criminal Appeal No. 290 of 2011; and* ***Selina Yambi and 2 Others v. Republic,*** *Criminal Appeal No. 94 of 2013 – all unreported)."*

In the case at hand, it is apparent that not only that the trial judge failed to sum up the evidence for both parties, but also he did not disclose to the assessors the vital points which he later extensively discussed in his judgment and related them to the facts, and ultimately relied upon them to ground the appellant's conviction.

Basically, the omission of the trial judge of summing up the substance of the case of both sides and revealing the vital points of the fact of the case in relation to the law to the assessors constituted a fatal error, which in the circumstances of the case at hand, rendered the entire trial court's proceedings a nullity. For this position, see the decisions of

the Court in **Othman Issa Mdale v. The Director of Public Prosecutions,** Criminal Appeal No. 95 of 2013**, Khamis Rashid Shaaban v. The Director of Public Prosecutions,** Criminal Appeal No. 284 of 2013 (both unreported) and **Kinyota Kabwe v. The Republic,** (supra). This is so because, it is taken that the trial was conducted without the aid of assessors contrary to the mandatory requirement on the importance of their involvement as stipulated by the then section 265 of the CPA before the amendment enshrined by the Written Laws (Miscellaneous Amendments) Act, No. 1 of 2022.

In **William Safari Kayda v. The Republic**, Criminal Appeal No. 37 of 2017 (unreported) the Court emphasized that:

> *"...the assessors will properly exercise their statutory role and make informed opinions and effectively aid the trial judge in a criminal trial only if the trial judge has fully involved them which entails as well, the summing up to them of the entire evidence of the prosecution and that of the defence in relation to the law ..."*

We are settled that the omission constituted a miscarriage of justice as correctly submitted by counsel for the parties. In the circumstances, we allow the first ground of appeal.

The next question is on the appropriate order we should make. Counsel for the parties held diverting opinions. While the respondent Republic's counsel advocated for retrial on account of sufficiency of evidence, that of the appellant held a firm opinion that owing to the irregularity in the admission of a crucial exhibit and insufficiency of evidence on record to support the persecution case, the appellant should be entitled to be released from custody.

We have seriously pondered the contending arguments of the parties' counsel. Having, considering the nature of the offence, the trial court's omission and the factual setting of the material on record, we are of the settled view that the only reasonable remedy for us is to order a retrial.

In the circumstances, we allow the appeal. Moreover, as the first ground of appeal suffices to dispose off the appeal, we do not find the need to consider the rest of the grounds reproduced above.

Consequently, we nullify the trial court's proceedings, quash conviction and set aside the sentence meted on the appellant.

In the end, we remit the record in Criminal Sessions Case No. 272 of 2020 to the High Court and direct that an expedited retrial be held

before another judge in accordance with the current law as stipulated under section 265 (1) of the CPA with regard to the involvement of assessors. In the meantime, the appellant shall remain in custody pending retrial.

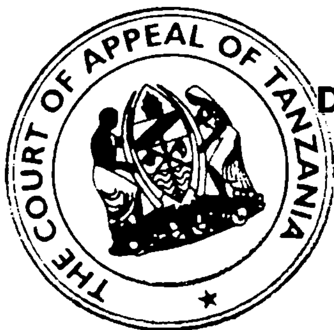
DATED at **IRINGA** this 3rd day of November, 2022.

F. L. K. WAMBALI
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

This Judgment delivered this 4th day of November, 2022 in the presence of Mr. Jally Mongo the learned counsel for the Appellant and Mr. Alex Mwita, 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