IN THE COURT OF APPEAL OF TANZANIA

AT IRINGA

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

CRIMINAL APPEAL NO. 508 OF 2020

JALILU MGOBA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

[Appeal from the Decision of the High Court of Tanzania at Mafinga]

(Matogolo, J.)

dated the 30th day of July, 2020

in

Criminal Sessions Case No. 88 of 2016

JUDGMENT OF THE COURT

3rd & 7th November, 2022

LEVIRA, J.A.:

In the High Court of Tanzania Iringa District Registry at Mafinga (the trial court) the appellant Jalilu Mgoba was charged with the offence of murder contrary to section 196 of the Penal Code [R.E. 2002 now R.E. 2022]. It was alleged that on 15th February, 2016 at Ikangwamani Village in Mufindi District Iringa Region, the appellant murdered Zuhura Msusa Mkimbilile (the deceased) who was his grandmother. The appellant was prosecuted and upon a full trial, he was convicted and sentenced to suffer

death by hanging. Aggrieved, the appellant has preferred the present appeal.

The prosecution case was based on the evidence of four witnesses; namely, Omary Juma Uganga (PW1), Hawa Uganga (PW2), D/C Paul (PW3) from Mafinga Police Station and Zena Abdul Suleiman (PW4). The substance of the prosecution evidence is to the effect that, the appellant killed the deceased who was his grandmother because he could not hold hearing villagers condemning her of witchcraft. He inquired from the deceased to know the truth concerning the allegations. The deceased unveiled to him that indeed, she was a witch. Upon hearing the response from his grandmother, he became furious and thus decided to kill her.

According to PW1, on the fateful date (15th February, 2016) while going to the shamba, he met the appellant on the way who told him what he had done and requested him that they go together to the deceased home (the scene of crime) so that PW1 could see the deceased. Having received that information, PW1 informed his neighbour who accompanied them to the scene of crime. Upon arriving there, they saw the body of the deceased lying on the ground. PW1 raised an alarm and the villagers gathered at the scene of crime. The appellant was taken to the village

office and later to the police where his cautioned statement was recorded by PW3 and it was admitted as exhibit P2 during trial. PW2 testified also that she was told by the appellant that he had killed his grandmother when they met on the material day. She went to the scene of crime and witnessed the body of the deceased. The death of the deceased was confirmed by PW4 who conducted postmortem examination whose report was admitted as exhibit as exhibit P4. According to PW4, the cause of the deceased's death was severe hemorrhage and loss of much blood.

In his defence, the appellant testified that he cut the deceased with a panga as he was angry following accusation by villagers that the deceased was a witch and confirmation by the deceased that indeed, she was a witch and that she killed the appellant's mother because of her witchcraft.

Ultimately, the learned trial judge having heard and weighed the evidence of both sides, was satisfied that the prosecution proved its case to the required standard and thus convicted and sentenced the appellant as intimated above.

On 7th December, 2020 the appellant filed in Court a Memorandum of Appeal comprising of eight grounds. However, the said memorandum was

abandoned at hearing of the appeal following consensus by the appellant and his advocate, one Jassey Samuel Mwamgiga to rely on a sole ground of appeal as presented in the Supplementary Memorandum of Appeal lodged on 2nd November, 2022 by his counsel; which in essence claimed that:

> *"The Trial High Court Judge neither informed the assessors their roles before the commencement of the trial nor made a proper summing up to them before receiving their opinions."*

On the other hand, the respondent Republic was represented by Messrs. Matiku Nyangero and Juma Mahona, both learned State Attorneys.

Submitting in support of the ground of appeal, Mr. Mwamgiga stated that the ground of appeal he presented is twofold. On the first part, it brings forth a complaint that assessors who set with the trial judge were not informed of their role after being selected to sit in trial with the view of aiding the trial judge as per the requirement of the law under section 265 of the Criminal Procedure Act [Cap 20 R.E. 2019 now R.E. 2022] (the CPA), as reflected in the record of appeal. In his submission, the omission tainted the trial court's proceedings. He supported his argument with the

decision of the Court in **Batram Nkwera @ Mhesa v. The DPP,** Criminal Appeal No. 567 of 2019 (unreported).

On the second part, the appellant complains that the trial judge neither summarised the substance of evidence to assessors nor explained the vital points of law to them before inviting them to give their opinions contrary to the requirements of section 298 (1) of the CPA. He referred us to page 62 of the record of appeal where the trial judge only told them the possible defences which the appellant could raise by listing them, to wit, provocation, self-defence, intoxication, insanity and compulsion without explaining to them what they mean and how they can be applied in a case. However, he said, for instance, the defence of provocation was applied by the trial judge in his decision, but as intimated earlier, it was not explained to the assessors and that is why, he argued, in their opinions they said nothing regarding that defence. In totality, he argued, the trial was not conducted with the aid of assessors as per the law. He thus prayed for the appeal to be allowed, conviction quashed and the sentence be set aside with an order for a retrial as it was decided in the case of **Batram Nkwera @ Mhesa** (supra).

In response, Mr. Nyangero concurred with the submission by Mr. Mwamgiga in support of the appeal. In addition, he cited the case of **Msigwa Matonya and 4 Others v. The Republic,** Criminal Appeal No. 492 of 2020 (unreported), in which stages to be followed when the trial court sits with assessors are listed. He submitted further that, in the present case, the assessors were properly selected but they were not informed of their duties and the possible defence. Although the appellant pleaded provocation, the assessors were not told about that defence. According to him, since the trial judge did not observe the stipulated procedure under the law, the proceedings were a nullity as stated in **Msigwa Matonya and 4 Others'** case. He urged us to invoke section 4 (2) of the Appellate Jurisdiction Act [Cap 141 R. E. 2019] (the AJA) to order for a retrial in accordance with the current position of the law under section 265 (1) of the CPA. Following concessions by the counsel for the respondent to the ground of appeal, there was no rejoinder from the counsel for the appellant.

The sole ground of appeal presented before us raises a crucial legal point as far as the position of the law before the current amendment of section 265 of the CPA brought by the Written Laws (Miscellaneous Amendments) Act No. 1 of 2022 with regard to the involvement of

assessors during trial. Since the trial under consideration was conducted before the amendment, we shall consider whether the trial judge complied with the requirements of sections 265 and 298 (1) both of the CPA in the conduct of the trial of the appellant. It is common knowledge that the law as it was, compelled all trials before the High Court to be conducted with the aid of assessors, but currently, in terms of section 265 (1) of the CPA the position has changed. We have thoroughly perused the record of appeal and carefully listened to the submissions by the counsel for the parties in support of the ground of appeal presented before us. At the outset, we agree with their submissions that, indeed, there was none compliance of the above provisions of the law. We shall demonstrate.

It is noteworthy that the phrase *"trials to be conducted with the aid of assessors"* is wider in so far as the participation of assessors in a trial is concerned. It is not all about mere presence in court after being selected, but it entails full awareness of their duty and responsibilities throughout the trial and the value of their opinions in aiding the trial judge to arrive at a just decision. In **Apolinary Matheo & 2 Others v. Republic**, Criminal Appeal No. 436 of 2016 (unreported) the Court held:

> "... *failure to explain to the assessors of their duties makes the trial unfair warranting its nullification.... In*

the upshot, since the trial judge omitted to explain to the assessors of their role, that omission was fatal vitiating the trial."

In the present case, three assessors, namely, Kisa Bupe Mboja, Agness Benedict and Evaristo Mallya were duly selected to sit with the trial judge in the trial. However, according to the record, immediately after being selected and upon appellant's '*no objection*' response after being asked if he had any objection, the first prosecution witness was called to testify. There is nothing in the record indicating that they were informed of their role and responsibilities for them to have effective participation in the trial. We are aware that informing assessors of their duties is a rule of practice but very crucial in achieving a fair trial and ultimate just decision. The importance of informing assessors of their role and responsibilities was stated in the case of **Hilda Innocent v. Republic**, Criminal Appeal No. 181 of 2017 cited in **Galula Nkuba @ Malago and Another v. The Director of Public Prosecutions**, Criminal Appeal No. 394 of 2018 (both unreported) and also cited in **Batram Nkwere @ Mhesa** (supra) supplied to us by the counsel for the appellant, where the Court stated as follows:

"... although informing assessors on their role and responsibility is a rule of practice and not rule of law, as it is for a long time an established and accepted practice in order to ensure their meaningful participation, a trial judge must perform this task immediately after ascertaining that there is no any objection against any of the assessors by the accuse before commencing the trial. It is also a sound practice that a trial judge has to show in the record that this task has been fully performed ....Thus, failure to inform assessors on their role and responsibility in the trial diminishes their level of participation and renders their participation which is a requirement of the law meaningless."

Being guided by the above position, we observe that since the record of appeal at hand is silent as to whether the assessors were informed of their duty and responsibilities after being selected, it cannot be said with certainty that they participated fully in the trial to assist the trial judge and hence, there was contravention of section 265 of the CPA. We find merit in the first part of the ground of appeal.

As intimated above, it was also the contention of the appellant that the trial judge contravened section 298 (1) of the CPA by failure to explain

to the assessors the vital points of law. The said section provides as follows:

> *"298.- (1) 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."*

We must acknowledge that the trial judge summarised the substance of the evidence for the prosecution and defence when the cases for both parties were closed though insufficiently. We say so because the assessors were not enlightened on how the substance of the evidence adduced are related with the established principles of law. For instance, in his defence the appellant did not deny to have killed the deceased but he gave an excuse that he did so because **first**, he was embarrassed by the villagers that his grandmother was a witch; **second**, he asked his grandmother whether she was a witch and she admitted; and **third**, his grandmother told him that his mother died because of the said witchcraft. In his judgment, the trial judge discussed in extenso the principles relating to confession and provocation. However, he did not explain to them what is confessional statement and its value in evidence.

Likewise, the assessors were not addressed on the defence of provocation which the trial judge also discussed in details in the judgment in relation to the appellants defence, as hinted above and finally held that the said defence could not stand in the circumstances of this case.

We have carefully read the assessors' opinion and learnt that, they all returned a verdict of guilty but none of them touched for instance, the element of 'cooling or otherwise' in relation to the defence of provocation. Their verdict was based on fact that there was no dispute that the appellant used a panga to kill the deceased. We think, had they been informed of the applicability of that defence, they might have been in a position of giving an informed opinion, regard being on the circumstances of the case. In **Mbalushimana Jean-Marie Vienney @ Mtokambali v. Republic**, Criminal Appeal No. 102 of 2016 (unreported), the Court stated that:

> *"... the opinion 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 opinion is invariably reduced."*

Likewise, in the instant case, as we have shown above the assessors were not addressed on the vital points of law and thus their opinions cannot be gauged to attain a maximum aid envisaged under section 265 of the CPA. We find comfort to associate with what the Court stated previously in **Abdalla Bazamiye and Others v. Republic** [1990] T. L. R. 42 also quoted in **Batram Nkwera @ Mhesa** (supra) thus:

> *"We think that the assessors' full involvement as explained above is an essential part of the process, that its omission is fatal, and renders the trial a nullity."*

Following our discussion above, we as well, find that the omission by the trial judge to inform the assessors of their duties and vital points of law pertaining the adduced evidence, was a fatal omission that affected their involvement and the anticipated aid to the trial judge in contravention of sections 265 and 298 (1) of the CPA, rendering the trial a nullity. We therefore find merit in the sole ground of appeal.

As regard to the way forward, having considered the record of appeal, we have no reason to decline the prayer by the counsel for the parties that we should order for a retrial. We are satisfied for the interest of justice that ordering for a retrial, is an inevitable course to take. Consequently, we allow the appeal, nullify the proceedings in Criminal

Sessions Case No. 88 of 2016, quash conviction and set aside the death penalty imposed on the appellant. We order for an expeditious retrial of the appellant before another judge in accordance with the current provisions of section 265 (1) of the CPA with regard to the involvement of assessors. We further order that the appellant should remain in custody pending retrial.

DATED at **IRINGA** this 5th 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 7th day of November, 2022 in the presence of the Mr. Jassey Mwamgiga, learned Counsel for the Appellant and Ms. Veneranda Masai, State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL