IN THE COURT OF APPEAL OF TANZANIA
AT IRINGA

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

CRIMINAL APPEAL NO. 507 OF 2020

WILBERT MPYIGISA .....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

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

(Matogolo, J.)

dated the 30th day of July, 2020

in

Criminal Sessions Case No. 30 of 2016

JUDGMENT OF THE COURT

1st & 7th November, 2022

MAIGE, J.A.

The appellant was charged at the High Court of Tanzania Iringa District Registry at Mafinga (the trial court), with the offence of murder contrary to section 196 of the Penal Code [Cap. 16. R.E., 2019 now R.E 2022]. It was alleged by the prosecution that; on 10th day of April, 2015

(the material date), at the Mkangwe village within Mufindi District in Iringa Region, the appellant murdered Mradi Kinyaga (the deceased).

From the record, it would appear, whether the deceased dead in an unnatural death has never been in dispute. The controversy which the trial court was called upon to resolve and whose decision is the subject of this appeal, is whether the appellant is the author of that untimely death.

To establish the case, the prosecution relied on two substances of evidence to wit; dying declaration of the deceased and the appellant's confessional statement. The former emanated from the testimony of Joan Kinyaga (PW1), the son of the deceased. He testified that, on the material date, when he visited the home residence of the deceased with a view to drinking bamboo juice (ulanzi), he found the latter lying down while bleeding. When he asked him what was wrong, the deceased told him that he had been beaten by the appellant on allegation that he was a witch. Right away, PW1 rushed to the village office to seek for assistance where he found the village executive officer and narrated to him what had happened. Together with him, they went at the scene of crime. They found the deceased already dead. He was bleeding from his ears and nose and it appeared as if he had been beaten on the back and head. The matter was

then reported to the police and soon thereafter, some police officers together with Dr. Blandina Manyanda (PW2) came at the scene of crime. PW2 examined the dead body of the deceased and found out as per the postmortems examination report (exhibit P1) that, he had died and the cause thereof was head injury.

The latter piece of evidence, was in the form of extra judicial statement. It was recorded by Edina Mwangulumba (PW3) on 15th April, 2015. She was at that particular juncture a primary court magistrate at Mafinga Urban Primary Court. The statement was produced into evidence as exhibit P2 without objection. Exhibit P2 shows that the appellant confessed commission of the offence.

In his defence, the appellant vehemently refuted committing the offence under discussion. He more so, disassociated himself with the confessional statement in exhibit P2. Besides, he denied presence at the scene of the crime on the material date.

As it was the procedure, the trial of the case was conducted with the aid of three assessors. Of significance to note is the fact that, all assessors unanimously supported the conviction of the appellant. The trial Judge having been persuaded by the two substances of the evidence as

aforesaid, concurred with the gentle assessors and convicted the appellant with the offence and sentenced him to suffer death by hanging.

The appellant is aggrieved with both the conviction and sentence. He has, by way of a memorandum of appeal, raised two grounds to challenge the same. **First,** the assessors were not properly addressed on their roles and responsibilities as well as on the substance of the evidence at issue and the vital principles involved. **Second,** the case against him was not proved beyond reasonable doubt.

In the prosecution of the appeal, the appellant enjoyed the service of Mr. Jally Willy Mongo, learned advocate while the respondent Republic had the service of Ms. Magreth Mahundi, learned State Attorney.

Mr. Mongo's criticism of the decision of the trial court on the first ground has two aspects. The first one is failure of the trial Judge, to address the assessors on their duties and responsibility prior to the trial. He submitted that, although there is no express statutory provision imposing such a requirement, its inevitability has been implied by case law such that it has become a condition precedent for trials with the aid of assessors. It being a mandatory requirement, he submitted, its omission renders the trial as if not conducted with the aid of assessors and,

therefore, null and void. In this respect, the counsel relied on the case of **Betram Nkwera @ Mhesa v. R.**, Criminal Appeal; No. 567 of 2019 (unreported). Drawing our attention at page 28 of the record of appeal, the counsel submitted, correctly in our view, that the trial Judge did not, soon upon the commencement of the trial or at all, explained to the assessors what they were expected to do during trial, in assisting him.

On the second aspect, the counsel started by reminding us on the obligation of the trial Judge under section 298(1) of the Criminal Procedure Act [Cap. 20 R.E. 2022], henceforward, "the CPA", to explain to the assessors soon after the closure of both cases about the substance of evidence adduced and the vital points of law involved. Having said that, the counsel, making reference to the summing-up notes appearing at pages 52-57 of the record of appeal, informed the Court, rightly in our view, that the trial Judge did not, in the said notes explain to the assessors some essential points of law in the evidence and defence involved notwithstanding that, the same were used prominently in deciding the case. He mentioned such vital points as dying declaration, defence of *alibi* and corroboration evidence. He submitted therefore, that, for the reason of such omission, the trial should be deemed to have been made in the

absence of assessors and thus null and void. He relied, on this, on the authority in **Kinyota Kabwe v. R,** Criminal Appeal No. 198 of 2017 (unreported). He urged us, therefore, to nullify the proceedings of the trial court.

On the second ground, it was Mr. Mongo's submission that since it was express in the confessional statement in exhibit P2 that; the appellant killed the deceased under provocation, the trial court should have, instead of convicting him of the offence of murder, convicted him of the lesser offence of manslaughter.

In the strength of the second ground, therefore, Mr. Mongo urged us not to apply the general practice of ordering for retrial. In his contention, the appellant's conviction of murder should be set aside and substituted with a conviction for manslaughter. Further that, the Court should, in consideration of the mitigation circumstances on the record and the appellant's post-conviction incarceration, pronounce the appropriate sentence to the appellant.

Ms. Mahundi, on her part, fully supported the first ground of appeal. She did not support the second ground however. In her humble view, the evidence of PW1 on the deceased's dying declaration coupled with the

appellant confessional statement in exhibit P2, left no any reasonable doubt that, it was the appellant and no one else was behind the death of the deceased. The defence of provocation, she submitted, does not arise because the alleged provocative words were not expressed to the appellant by the deceased himself but by a third party. Come what may, she submitted, the issue cannot be decided at this stage because the assessors who assisted the trial Judge in the trial, were not informed, before opining, of the essential elements of that defence. In her view, therefore, the appropriate order should be retrial.

We have given the counsel's submissions due consideration and carefully examined the record of appeal. We shall now consider the substance of the appeal starting with the first ground. It is common ground that, the trial of this case was conducted with the aid of assessors. That was, before the current amendment of section 265(1) of the CPA, a mandatory requirement. We subscribe to the concurrent counsel's submission that; so that the assessors' participation in the trial process becomes meaningful, the trial court is obliged, before commencement of the trial, to address them on their role and responsibilities. There are many decisions in support of this position. Suffices it to refer the case of

Batram Nkwera @ Mhesa v. DPP, Criminal Appeal No. 567 of 2019 (unreported) where it was stated:

> *"Given its significance, there is unbroken chain of this Court's decisions adjudging that failure to relate to the assessors the role they have to perform during the trial, seriously impairs their participation. The trial turns to be not with the aid of assessors as imperatively required under section 265 of the CPA."*

We equally agree with the learned counsel for both parties that, unless the substance of the evidence of both sides and the vital points of facts and law therein involved are summed up to them, the gentle assessors cannot be in a position to give useful opinions to the trial court. Failure to make a proper summing up to the assessors, therefore, is a serious irregularity which vitiates the entire proceedings of the trial court. Thus, in **Msigwa Matonya and Others v. R,** Criminal Appeal No. 492 of 2020 (unreported), it was held;

> *"Following this settled law, we hold the same in the present appeal. We find and hold that the High Court Judge erred in not summing up to assessors on vital points of law which he used to convict the*

appellant. That ailment is fatal and cannot be rescued by section 388 of the CPA."

As we said above, the appellant in the case at hand was convicted mainly basing on dying declaration and the appellant's confessional statement. So that the assessors could be in a better position to advice the trial Judge on the guilty or otherwise of the appellant, the trial Judge was expected to make the assessors familiar with the essential elements of these types of evidence and the principles of law under which they are reliable. Apparently, the trial court omitted, in the summing up notes to address the parties on the essential elements of the two types of evidence used namely, dying declaration and confessional statement as much the two types of defence namely, provocation and *alibi.* Without the assessors being informed with such vital points, we agree with Mr. Mongo, they could not, as they did, make a meaningful opinions to the trial Judge. Our view on this can be implied from the opinions of the assessors appearing at pages 58 and 59 of the record of appeal which are absolutely silent on those vital points. In the circumstance, therefore, the first ground of appeal has merit and it is allowed.

This now takes us on the question of what order should follow after the nullification of the proceedings of the trial court. Admittedly, though the general position is such that, an order for retrial should follow, in fit cases and where the evidence in support of the conviction is, on the face of it, too weak to support conviction, an order setting the appellant free may be appropriate. Mr. Mango has invited us to opt the second option. His reason being that, the appellant's confessional statement on the basis of which he was convicted, did not incriminate him with the offence of murder but the lesser offence of manslaughter. For the respondent, it was submitted to the contrary. The reason being that, the conviction of the appellant was not solely based on confessional statement but dying declaration as well.

Having considered the contending views of the counsel in line with what are in the record, we are of the view that; the justice of this case calls for retrial rather than setting the appellant free. In reaching to this conclusion, we have warned ourselves, as per the principle in **Fatehali Manji v. R** [1966] E.A. 343, of the possible danger of the prosecution making use of the retrial to fill the gaps and satisfied ourselves that there are no gaps to be filled in.

In the final result and for the foregoing reasons, we nullify the proceedings of the trial court, quash the appellant's conviction and set aside the sentence. We order for an expediated retrial of the appellant before another Judge in compliance of the requirement under the current provisions of section 265 (1) of the CPA in respect of involvement of assessors. In the meantime, the appellant should remain in custody pending his retrial.

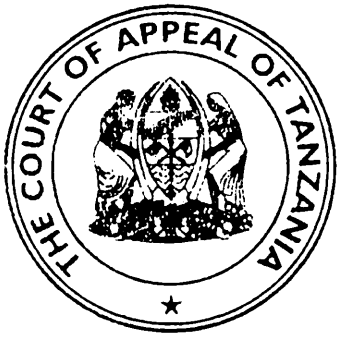
DATED at **IRINGA** this 5th day of November, 2022.

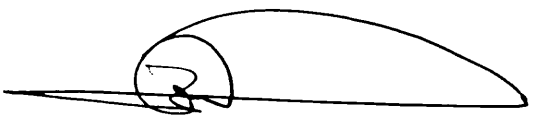
F. L. K. WAMBALI
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

The Judgment delivered this 7th day of November, 2022 in the presence of Jassey Mwamgiga and Ms. Veneranda Masai, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.





J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL