IN THE COURT OF APPEAL OF TANZANIA

AT BUKOBA

(CORAM: MUGASHA, J.A., FIKIRINI, J.A, And KENTE, J.A.)

CRIMINAL APPEAL NO. 599 OF 2020

RAMADHANI PETRO.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Bukoba held at Biharamulo)

(Bahati, J.)

dated the 09th day of June, 2020
in
Criminal Sessions No. 121 of 2016

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JUDGMENT OF THE COURT

28th November & 1st December, 2022.

FIKIRINI, J.A.:

The appellant, Ramadhan Petro was convicted of murder and sentenced to death by the High Court sitting at Biharamulo in Criminal Session No. 121 of 2016; he is now appealing against both the conviction and sentence. Before us the appellant is represented by Mr. Al-Muswadiku K. Chamani, learned advocate, while the respondent Republic is

represented by Mr. Nestory Nchiman together with Mr. Robert Kidando both learned Senior State Attorneys.

The prosecution case was essentially based on the evidence of Zerida Jeremiah (PW1) the deceased's wife, Francis Philemon Mhemba (PW2) and Jason Marobi (PW4) who witnessed the appellant murdering Jeremiah Petro (the deceased). The evidence of these three (3) was supported by the post-mortem examination report (exhibit P1), which was tendered unobjected by the defence, stating the cause of death was a cut wound on the scalp, mandible and right thigh. The appellant does not dispute attacking the deceased with a hoe handle allegedly during their fight.

The chronicle of what transpired on 19th December, 2015 at around 17:00 hours as gathered from these witnesses, particularly PW1, was that the appellant and the deceased had each inherited pieces of land from their father. The appellant seemed discontent with the distribution made by the clan members. As a result, he kept on moving the boundaries. On a fateful day while at home, PW1 heard people fighting and opted to go to see what was going on. On arrival, she met the appellant and the deceased fighting. The appellant was beating up the deceased with a hoe handle on different parts of his body including the head. Aside from beating the

deceased, PW1 saw the appellant taking out a knife from his pocket trousers and stabbing the deceased on the cheek and lap. She raised alarm and people came to her aid. Among those who responded was PW2 the Village Chairman, who was at one Anania whose house was burnt. PW2 witnessed almost everything PW1 accounted for, including Hemed the appellant's son failing to separate the appellant and the deceased who were engaged in a fight. Seeing the intensity of the situation, PW2 raised alarm calling for more assistance. PW4 who had the same version of the story to that of PW1 and PW2, was among those who responded by going to the scene.

It seemed the appellant overpowered and seriously injured the deceased, though he attributed the injuries to have been caused by sharp thorns and cut trees. At the scene those present attempted to place the appellant under arrest but could not succeed as he threatened those chasing after him. The matter was reported to Police at Chamgoma who in return assisted informing the Chamgahaba Police Station. A Police officer who attended to the scene of crime came in a company of a Medical Doctor. The Medical Doctor examined the deceased's body and concluded the cause of death to be head injury, cut wound on the scalp, mandible

and leg. He later released the body to the family. The post-mortem examination report was admitted as exhibit P1. With assistance from Ngara Police Station, the appellant was arrested after three (3) days at the unfinished house in Kanazi area.

Defending himself, the appellant gave a lengthy account and essentially, he did not dispute that there was a fight between them and the cause being a dispute over boundaries. He equally did not dispute that he beat up the deceased using a hoe handle. The only difference in his account was that the deceased was the one who started the fight by uprooting his coffee plants. Despite the appellant's warning stopping the deceased from doing that, he continued at the same time uttering the words "*Nitakutoa roho.*" He then attacked him on the neck and he fell down. The deceased continued annoying the appellant by throwing stones he was carrying in his pocket at him. Fed up, the appellant threw a hoe handle which sent the deceased to the ground. This nonetheless, did not deter the deceased who continued throwing stones at the appellant. Hemed the appellant's son who was present at the scene hit the deceased who was on top of the appellant with the hoe handle. This is inconsistent with the prosecution version of the story particularly that of PW1, PW2 and

PW4 who arrived at the scene and found the appellant beating the deceased. None of the three witnesses saw Hemed beating up the deceased in the rescue mission, instead their account was they witnessed him separating the two. The appellant stated to have left the scene while the deceased was still alive and headed for Ngara where he stayed at his neighbour's until when he was arrested on 20th December, 2015.

Satisfied that the prosecution had proved its case to the standard required, that the appellant unlawfully caused the death of the deceased, the trial court proceeded to convict and sentence the appellant according to the law.

Dissatisfied with both the conviction and sentence the appellant preferred this appeal with a total of seven (7) grounds. For the reason which shall be apparent soon, we shall narrow our determination of this appeal to only the issue of summing up to assessors which was raised by Mr. Chamani, after he had abandoned all the other grounds in the Memorandum of Appeal. The raised issue being of legal significance we reckon deserves our attention.

When we called the learned advocates for the parties to address us, they both conceded on the existing irregularity. Mr. Chamani submitting on

the point, prefaced it by introducing the case of **Chesco Mveka v. R**, Criminal Appeal No. 506 of 2020 (unreported) in which the Court emphasized the importance of explaining to the assessors' various defences depending on the facts of each case and law regarding them. Referring us to page 44 of the record of appeal, he argued that there seems to have been a fight between the appellant and the deceased. However, the Judge when summing up to assessors, she did not explain that to the assessors and how that could have had an impact on a murder charge.

He further took us to page 75, when PW1 was clarifying a point and clearly stated that the two were fighting. He contended that had this been brought up and explained to the assessors they might have come up with a different verdict, possibly returning the verdict of guilt for the offence of manslaughter and not murder.

In light of the above submission, he urged us to nullify the judgment, quash the conviction and set aside the sentence. On the way forward, Mr. Chamani implored that the record be remitted back to the High Court to commence from where the summing up to the assessors was to be conducted.

On their part, the respondent Republic through Mr. Nchiman addressed the Court, conceding to the point raised. Like Mr. Chamani, Mr. Nchiman heralded his submission by referring us to the case of **Mashaka Athumani Makamba v. R,** Criminal Appeal No. 107 of 2020, in which the Court underscored a legal requirement under section 265 of the CPA, that all criminal trials before the High Court should be conducted with the aid of assessors. The requirement of appraising assessors on both the prosecution and the defence cases and the legal implications was a must, stressed Mr. Nchiman. Highlighting the areas, he thought ought to have been explained to the assessors, he referred us to several pages of the record of proceedings indicating there was a fight between the appellant and the deceased, such as on page 29 when PW2 testified that he was near and saw the appellant and the deceased fighting. Again, on page 31 he stated seeing Hemed separating the two while on page 44 the appellant explained on Hemed going to rescue him from the fight. From the highlights, it was obvious the evidence from both sides in its totality refer to the appellant and the deceased fighting. The Judge was thus obliged to point out that fact to the assessors and its legal effect.

A perusal of the record of appeal from pages 50 to 64, nowhere the Judge has appraised the assessors on that fight between the appellant and the deceased leading to the deceased's death. The proceedings from this stage were thus marred and Mr. Nchiman prayed for those proceedings pursuant to section 4 (2) of AJA, to be nullified, conviction quashed and sentence set aside, followed with an order of remitting the record to the High Court for the Judge to prepare new summing up notes which shall include the evidence on "fighting between the appellant and the deceased" and its legal implication and address the assessors accordingly.

With the above response from Mr. Nchiman, Mr. Chamani had nothing to rejoin.

We have dispassionately considered the learned advocates' concurring submissions and find ourselves unable to disagree with them. It was a prerequisite prior to the amendment by the Written Laws (Miscellaneous Amendments) Act, No. 1 of 2022 of the Criminal Procedure Act [Cap 20 R.E. 2002 now R.E, 2022] (the CPA) stemming from section 265 of the CPA, that all criminal trials before the High Court should be conducted with the aid of assessors the number of whom shall be two or more as the court may find appropriate.

The obligation is further extended under section 298 (1) of the CPA, requiring a trial Judge sitting with assessors, to sum up, the evidence before inviting them to give their opinions. The subsection reads:

> *"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."*

The main purpose of the two above provisions is to enable assessors whose opinion is of great value to aid the Judge to arrive at a correct decision. Failure to observe that could lead to inadequate summing up which consequently renders the trial a nullity.

However, this can only occur if the assessors are made to understand the facts of the case and the relevant law. There is a long list of our previous decisions on the subject such as **Washington Odindo v. R** (1954) 21 EACA 392; **Augustino Lodaru v. R**, Criminal Appeal No. 70 of 2010; **Charles Lyatii @ Sakala v. R,** Criminal Appeal No. 290 of 2011 and **Selina Yambi and Two Others v. R,** Criminal Appeal No. 94 of 2013; **Masolwa Samwel v. Republic**, Criminal Appeal No. 206 of 2014;

Omari Khalfan v. Republic, Criminal Appeal No. 107 of 2015; **Chesco Mveka** and **Mashaka Athumani Makamba** cited by the counsel for the parties (all unreported). In **Washington Odindo** (supra) the erstwhile Court of Appeal for Eastern Africa, underscoring the point had this to say:-

> *"The opinion of assessors can be of great value and assistance to a trial judge but only* ***if they fully understand the facts of the case before them in relation to the relevant law. If the law is not explained and attention not drawn to the sufficient facts of the case the value of the assessors' opinion is correspondingly reduced*** *..."* [Emphasis added]

With the enriched list of our previous decisions on the subject, in short, it means the exercise of summing up to assessors has to comprise adequate information based on both facts and all vital points of law pertinent to the particular case they are about to give their opinion in aiding the Judge. Failure to comply with this requirement is fatal, and it vitiates the whole proceedings.

In the appeal before us, it is evident that the Judge's summing up notes were inadequate and did not comply with the dictates of sections 265 and 298 (1) of the CPA. Our main reasons for saying so are **one,**

considering there was clear evidence that the two were engaged in a fight as testified by PW1, PW2, and DW1, the Judge ought to have addressed the assessors on that evidence and the possible defences which could have included provocation, self-defence, intoxication, mistake of fact, necessity, compulsion and accident, which the Judge did not do. **Two,** the Judge did not explain to them the meaning of each of the possible defences and their legal implication. The inadequate summing up certainly denied the assessors their meaningful participation in the trial, especially at the stage of giving their opinions.

For the reasons stated above, we find the inadequacy in summing up, has reduced the trial as one conducted without the aid of assessors. The non-direction by the Judge on the possible defences and their legal implication was fatal and rendered the trial nullity. However, considering the circumstances of the case at hand, and the concurrent prayer of the counsel for the parties, we invoke revisional powers under section 4 (2) of AJA to nullify the proceedings from the summing up stage, quash the conviction and set aside the sentence imposed on the appellant.

Consequently, we order the record be remitted back to the High Court and the Judge who presided over the matter to prepare fresh

summing-up notes and properly involve the assessors by summing up to them the facts and evidence including the fight between the appellant and the deceased which was not covered before. The Judge should also address them on possible defences and their legal implication before receiving their opinions. Meanwhile, the appellant shall remain in custody.

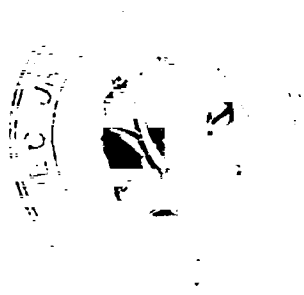
DATED at **BUKOBA** this 1st day of December, 2022.

S. E. A. MUGASHA
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

The Judgment delivered this 1st day of December, 2022 in the presence Mr. James Kabakama holding brief for Mr. Al-Muswadiku K. Chamani, learned counsel for the Appellant and the appellant present in person. Ms. Evaresta Kimaro, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.



A. L. KALEGEYA
DEPUTY REGISTRAR
COURT OF APPEAL