IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MKUYE, J.A., KENTE, J.A. And KIHWELO, J.A.)

CRIMINAL APPEAL NO. 179 OF 2021

ALLY JOHN..... 1ST APPELLANT
IDDI SELEMAN @ DAUDI .....2ND APPELLANT
SALUM FOCUS.....3RD APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

[Appeal from the decision of the High Court of Tanzania at Dar es Salaam]

(Mgonya, J.)

dated 7th day of September, 2020
in
HC. Criminal Session Case No. 78 of 2006

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JUDGMENT OF THE COURT

19th September & 5th December, 2022

MKUYE, J.A.:

The appellants, Ally John, Iddi Seleman @ Daudi and Salum Focus (hereinafter to be referred to as the 1st, 2nd and 3rd appellants respectively) were charged with the offence of murder contrary to section 196 of the Penal Code, [Cap 16 R.E. 2002, now R.E. 2022]. It was alleged that on the 30th day of December, 2003 at Maseyu Village within the District and Region of Morogoro, the appellants jointly with malice aforethought occasioned death of, one, James Mramba. Upon a full trial, the trio were convicted and sentenced to death by hanging.

Aggrieved, the appellants have now appealed to this Court on a joint memorandum of appeal.

Before embarking on the merit of the appeal, we find it appropriate to give a brief background of facts leading to this appeal as follows:

The deceased's brother, Marcis Morris Leenga (PW5) owned a shamba measuring thirty (30) acres at Maseyu Village which was attended by James Mramba (the deceased) and Salum Abdallah. While Salum lived somewhere else, the deceased resided in a farm house built in the shamba and was provided with two mattresses and beds.

It would appear that on the fateful night 30th December, 2003, the deceased was at his home. While there, he was attacked by unknown assailants who cut him with a sharp instrument and dragged him out of the residence he occupied. Thereafter, several items including mattresses, one small bag and eight pieces of corrugated iron sheets from that house went missing.

Early in the next morning, Salum Abdallah, the deceased's companion arrived at the deceased's residence but he was unable to trace him even when he called out his name. He also observed that the residence had been broken into and some items known to him were

missing. The situation scared him. He reported to the assistant ten cell leader (PW1). The information was then related to other villagers who gathered at PW1's residence, the deceased's home.

Upon inspection of the home, the body of the deceased was discovered lying some few paces from his residence. The deceased body had big cut wounds on the head, hands and face.

While gathered at the scene of crime, they observed shoe prints which resembled the shoes worn by the 3rd appellant who at the time was present at the scene. Smelling a rat the 3rd appellant took to his heels and effort to apprehend him proved futile. The 2nd appellant arrived at the scene and he was suspected on account of the shoes he wore. He was arrested immediately.

Then, the incident was reported to the police who arrived at the scene as well. Later, the 3rd appellant was arrested and led the police to the place where the stolen iron sheets were hidden. The two mattresses and small bag were retrieved from the residence of the 1st appellant who claimed that the said items were taken there by the 2nd and 3rd appellants late in the night.

On the basis of those facts, the appellants were all arraigned before the court on the information of murder as alluded to earlier on.

In defence, all appellants generally denied the commission of the offence and the evidence implicating them.

At the end of the trial, all appellants were convicted and sentenced as alluded to earlier on.

On 29th June, 2021 the appellants filed a self-crafted joint memorandum of appeal consisting six grounds and on 3rd August, 2021 they lodged their written statement of argument in support of their grounds of appeal which was followed by a list of authorities filed on 16th August, 2021. However, for a reason to become apparent shortly, we shall not reproduce them.

At the hearing of the appeal, the 1st, 2nd and 3rd appellants were represented by Messrs Daniel Welwel, Novatus Michael Mhangwa and Musa Mhagama, learned counsel, respectively. Whereas the respondent Republic was advocated by Mr. Michael Lucas Ng'hoboko, learned State Attorney.

Before the hearing of the appeal could commence in earnest, Mr. Welwel prayed and we granted him leave to add two new grounds of appeal as follows:

"1) That, the assessors wrongly and unprocedurally cross examined the witnesses contrary to the law,

2) The trial High Court failed to subject evidence into judicial scrutiny thereby convicting the appellants of murder without positive evidence on record to support the conviction".

Upon being invited to amplify the grounds of appeal, Mr. Welwel opted to begin with the first new ground to the effect that the assessors cross examined the witness. He took off by explaining the procedure used in trial whereby there are examination in chief, followed by cross examination by the accused's advocate, then re-examination by the prosecution before the trial court takes over. He submitted, however, that in this case the procedure adopted was that the witnesses were examined in chief, then cross examined by defence advocate followed by cross examination by the assessors before they were re-examined by the State Attorney. Mr. Welwel elaborated that, PW2 was cross examined by assessors as shown at page 87 to 88 of the record of appeal; PW4 at page 94; PW5 at page 100-101; and PW6 at page 153 of the record of appeal.

He argued further that it is the position of the law for the assessors and the trial judge to ask questions for clarification to the witness after the State Attorney has re-examined the witnesses and not before that. To bolster his argument, he referred us to the case of **Nathan Baguma @ Bushejela v. Republic**, Criminal Appeal No. 165 of 2015 (unreported) pages 3-4 where it was stated that, the place where the assessors were given opportunity to put questions to witnesses was not the right place. The learned counsel argued further that by re-examining the witnesses after they were cross examined by assessors means that the prosecution was given more opportunity to clarify even on questions asked by assessors and the Court.

Apart from that, Mr. Welwel submitted that the assessors cross examined the witnesses instead of seeking clarification from them. This, he said, was contrary to the law and concluded that since the anomaly occurred on five witnesses, it vitiated the proceedings. According to him, as there is no sufficient evidence to mount conviction, the Court should allow the appeal without ordering for a retrial as the prosecution may go to fill up gaps. To bolster his argument, the learned counsel referred us to the case of **Joseph Komba @ Janta and Another v. Republic**, Criminal Appeal No. 12 of 2019 in which the case of **Fatehali Manji v. Republic**, [1966] EA 313 was cited with approval.

Mr. Mhagama submitted on ground 5 of the substantive memorandum of appeal in that the trial judge failed to address the assessors on vital points of law such as the principles of doctrine of recent possession, evidential value of the retracted confession and application of circumstantial evidence. It was his argument that although the trial judge used circumstantial evidence (See page 185 of the record appeal) and the doctrine of recent possession (page 186-187 of the record), the same were not explained to the assessors during summing up as required by section 298 (1) of the Criminal Procedure Act [Cap 20 R.E. 2019]. According to him, this might have vitiated even their role of giving opinion to the trial judge. In this regard, Mr. Mhagama prayed to the Court to allow the appeal.

In response, Mr. Ng'hoboko essentially conceded that some vital points of law were not explained to the assessors. He further agreed that the assessors cross examined the witnesses (PW1, PW2, PW3, PW4 and DW1) even before they were re-examined by the State Attorney. He was of the view that, this was contrary to section 147 of the Evidence Act, [Cap 6 R.E, 2019] and urged the Court to nullify the proceedings and quash the judgment and order for a retrial. To fortify his argument, he relied on the case of **Batam Mkwera @ Mhesa v.**

The Director of Republic Prosecution, Criminal Appeal No. 567 of 2019 (unreported).

In rejoinder, Mr. Welwel insisted that the trial judge failed to explain the doctrine of recent possession and oral confession to the assessors. He stressed that, that was crucial as the assessors were not experts of such type of evidence which they were required to consider. As such, he equated this as if there were no assessors at all. In this regard, he argued that, ordering a retrial was not the best option under the circumstances.

Having examined the relevant grounds of appeal and the rival submissions, we think, the issue for this Court's determination is whether there were any irregularities in relation to the assessors and if the issue is answered in the affirmative what is the way forward.

In terms of section 265 of the CPA, all trials in the High Court are mandatorily required to be with the aid of assessors who shall be two or more as the court may deem fit - See also **Charles Karamji @ Masangwa and Another v. Republic**, Criminal Appeal No. 34 of 2016 (unreported). The trial entails among others to hear the evidence from the prosecution and defence. After both sides have closed their cases, the trial Judge is, under section 298 (1) of the CPA, enjoined to sum up

the evidence from both sides and require the assessors to give their opinions orally as to the case generally or to any specific question of fact addressed to them by the trial Judge. This requirement is crucial in order to give effect to the mandatory provisions of section 265 of the CPA (See- **Mulokozi Anatory v. Republic**, Criminal Appeal No. 124 of 2014 (unreported).

Moreover, for the opinion of the assessors to be of importance to the trial judge sitting with assessors, it is a requirement for the trial judge to make sure that they understand the facts of the case and how they relate to the laws involved. To achieve this, the trial judge is therefore required to ensure that the facts of the case together with the relevant laws are adequately explained to the assessors. This is done through the summing up. This was emphasized in the decision of the erstwhile East African Court of Appeal which has been followed by numerous decisions of this Court in **Washington Odindo v. Republic** (1954) 21 EACA 392 where it was stated as follows:

> *"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*

salient facts of the case, the value of assessors opinion is correspondingly reduced".

(See also – **Janta Joseph Komba @ Janta** (supra); **Charles Karamji @ Masangwa and Another** (supra) and **Michael Maige v, Republic,** Criminal Appeal No 153 of 2017 (unreported).

Regarding the effect of a failure by the trial judge to explain the vital points of law to the assessors, this is very crucial as it renders the proceedings a nullity.

This was stated in the case of **Said Msangama @ Senga v. Republic,** Criminal Appeal No. 8 of 2014 (unreported) as hereunder:

"Where there is in-adequate summing up, non-direction or misdirection on such vital point of law to the assessors, it is deemed to be a trial without the ald of assessors and renders the trial a nullity".

In this case, the appellants were convicted with the offence of murder on the basis of the circumstantial evidence, recent possession of the properties allegedly stolen from the deceased and confession as shown from pages 185 to 187 of the record of appeal. However, having examined the summing up to assessors at page 156 to 162 of the record of appeal, we have been unable to see where the trial judge explained to them the vital points of law or what entails the circumstantial

evidence, the doctrine of recent possession and retracted confessions for the same to be used to mount a conviction against the appellants. Instead, such explanation is seen in the judgment itself at the time it was used in the decision.

Since it is clear that the assessors were not addressed on the vital points of law relating to the case, we agree with Mr. Welwel that it cannot be said that the trial was conducted with the aid of assessors as per section 265 of the CPA. This has been the position of this Court in numerous decisions. Just to mention a few, they include; **Suguta Chacha and 2 others v. Republic**, Criminal Appeal No. 101 of 2011; **Omary Khalfan v. Republic**, Criminal Appeal No. 107 of 2015; **Richard Siame Mateo v. Republic**, Criminal Appeal No. 173 of 2017 and **Monde Chibunde @ Mdishi v. The DPP**, Criminal Appeal No. 328 of 2017 (all unreported).

Even in this case, being guided by the above cited authorities, as the trial Judge failed to explain the vital points of law to the assessors, it cannot be said that the trial was conducted with the aid of the assessors. This was a fatal irregularity with the effect of rendering the appellants' trial a nullity - See **Abdallah Bizare and Others v. Republic**, [1990] T.L.R. 42.

This, however, was not the only ailment in relation to the assessors. As was argued by Mr. Welwel and conceded by Mr. Ng'hoboko, the assessors' participation in the trial was irregular.

Our examination of the record of appeal has revealed that after PW2, PW4, PW5 and DW3 had completed their testimonies in chief, the advocate for the appellant cross examined them. This was followed by the assessors who cross examined them before they were re-examined by the State Attorney. Looking at the procedure adopted in this case, two anomalies emerge.

One, the assessors were allowed to cross examine the witnesses which was not their role. Their role was to ask questions for clarification as has been pronounced by this Court in a number of cases. Cross examination to the witnesses is the function of the adverse party to the proceedings. - (See **Kulwa Makomelo and 2 Others v. Republic**, Criminal Appeal No. 15 of 2014; **Mapuji Mtogwashinge v. Republic**, Criminal Appeal No. 162 of 2015 (both unreported) and **Abdallah Bazare and Others** (supra). **Two**, the assessors were given a chance to cross examine the witnesses before the State Attorney had re-examined them as provided for under section 147 of the CPA which states as follows:

"147 (1) The ***witness shall be first examined in chief, then (if the adverse party so desires) cross examined, then (if the party calling them so desires) re-examined.***

(2) The examination in-chief must relate to relevant facts, but the cross-examination need not be confined to the facts to which the witnesses testified on his examination in-chief.

(3) ***The re- examination shall be directed to the explanation of matters referred to in cross examination,*** *and, if new matter is, by permission of the court, introduced in re-examination, the adverse party may further cross-examine upon that matter.*

(4) The court may in all cases permit a witness to be recalled either for further examination in chief or for further cross-examination, and if it does so the parties have the right of further cross- examination and re-examination respectively.

(5) Notwithstanding the proceeding provision of this section, the court may, in any case, defer or permit to be deferred any examination or cross examination of any witness until any other witness or witnesses

have been examined in-chief or further cross-examined, re-examined or, as the case may be, further examined in-chief examined in-chief or further cross-examined".
[Emphasis added]

The above quoted provision of the law gives the sequence for the witnesses' examination in chief, cross examination and re-examination. The key player in the process is the person who called the witness, the adversary party and then the person who called the witness. There is no place for the assessor to cross-examine the witness before the party who called the witness re-examines him or her. We think, this is because the assessor is not an adverse party. In the case of **Nathan Baguma @ Bushejela** (supra) when the Court was faced with a similar situation, it had this to say:

"The record of appeal shows that after each prosecution witness had finished testifying, the counsel for the appellant cross-examined that witness. On completion the assessors took the floor. When they had finished, the counsel for the prosecution re-examined his witness. That procedure was also followed on the defence case. Reading sections 146, 147, 155 and 177 of the Evidence Act, Cap 6 R.E. 2002 (the Act) together, procedure adopted by the learned trial judge was

wrong. One, the place where assessors were given opportunity to put questions was not the right place".

[Emphasis added]

Even in this case, since the assessors were allowed to cross-examine the witnesses even before they were re-examined by the State Attorney, the proceedings were vitiated. The correct place or time for the assessors and the trial judge to put up questions to the witnesses was after re-examination had been done and not before that. Coupled with the fact that the assessors cross-examined the witnesses instead of putting questions for clarification, we are satisfied that, that was an irregularity which is incurably defective with the effect of rendering the trial a nullity.

As to the way forward, we are aware that the appellant's counsel urged the Court to refrain from ordering a retrial and instead allow the appeal with a view to releasing the appellant forthwith condensing that the prosecution evidence is weak. On the other hand, Mr. Ng'hoboko prayed for the Court to order for a retrial believing that there is sufficient evidence.

On our part, having considered the nature and the circumstances of the case, we are of the view that, the interest of justice demand that

a retrial should be ordered. Hence, in terms of the provisions of section 4 (2) of the Appellate Jurisdiction Act, [Cap 141 R.E 2019], we nullify the proceedings and judgment of the trial court, quash the conviction and set aside sentence imposed against the appellants and order for an expedited re-trial before another Judge with a new set of assessors.

It is so ordered.

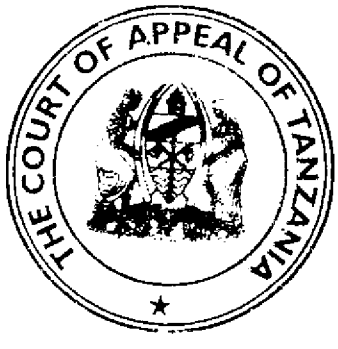
DATED at **DAR ES SALAAM** this 22nd day of November, 2022.

R. K. MKUYE
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

This Ruling delivered at Arusha via video conference this 5th day of December, 2022 in the presence of appellants Ally John, Iddi Seleman @ Daudi, and Salum Focus, who appear in person unrepresented and Mr. Lyton Muhesa (Principal State Attorney assisted by Mr. Hezron Mwasimba, State Attorney for the Respondents/Republic, is hereby certified as a true copy of the original.



G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL