IN THE COURT OF APPEAL OF TANZANIA
AT MUSOMA

(CORAM: MKUYE, J.A., MWANDAMBO, J.A. And MAIGE, J.A.)

CRIMINAL APPEAL NO. 249 OF 2020

CHACHA SAMSON ITEMBE MACHUBI..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the Resident Magistrates' Court of Musoma (Extended Jurisdiction) at Musoma)

(Ngaile, SRM with Extended Jurisdiction.)

dated the 1st day of April, 2020

in

Criminal Sessions Case No. 7 of 2020

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JUDGMENT OF THE COURT

5th & 12th June, 2023

MKUYE, J.A.:

Chacha Samson Itembe Machubi, the appellant, was charged with the offence of murder contrary to sections 196 and 197 of the Penal Code in Criminal Sessions Case No. 7 of 2020 (Hon. Ngaile, SRM – Extended Jurisdiction) (SRM Ext. Jur.) (as he then was). After a full trial, he was convicted and sentenced to the mandatory sentence of death by hanging. Aggrieved, he has appealed to this Court.

The background of the case leading to this appeal is as follows:

On the material day, 7/3/2018 at about 21:30 hrs Mwita Lucas Werya (the deceased), had gone to the center known as Kamagori to purchase some domestic items. The appellant had also gone there. It would appear that exchange of words between them ensued when the appellant allegedly engaged the deceased telling him to go home and cook. The deceased retorted to him that he was cooking for his children and that the appellant should remain as he is without a wife and children. Then the appellant left.

Meanwhile, the deceased purchased the necessities and began to walk back home. However, on the way, he was accosted by the appellant who had laid him. The appellant allegedly stabbed him on the stomach and fled away. The deceased shouted for help which was responded by Amos Magoiga Rhobi (PW3) who was on his way back home from where he had gone to invite people to assist him work in his farm the next day. PW3 saw the deceased lying beside the road but wounded. He went to call Mahanga Magoiga Werya (PW4) to assist him. The deceased mentioned the appellant to PW3 and PW4 to be the one who had stabbed him.

According to PW3 and PW4, they saw the deceased properly with

the aid of bright moonlight. They took the deceased to the Police Station where a PF3 was issued and then to Tarime District Hospital where he was attended by Devota Ernest (PW2), a clinical officer. While the deceased was still at Tarime Hospital, WP 7405 DC Sophia (PW5) recorded his dying declaration (Exh.P2) in which he among others, mentioned the appellant as his assailant. However, due to his worsening condition, he was referred to Musoma Regional Hospital where he met his death some hours later in the day.

On 8/3/2018, the deceased's body was taken to Tarime District Hospital where PW2 conducted an autopsy which revealed that his death was due to loss of a lot of blood, raptured spleen and heart failure.

In his defence, the appellant denied the commission of the offence. He testified that on the material day he did not go to the shop as he was at home and retired to bed at 21:00 hrs and on the following day, he went to work in their farm. He stated further that, on 10/3/2018, he went to his cousin in a neighboring village for farming activities until on 4/4/2018 when he was arrested. His evidence was corroborated by his father; Samson Thomas Chacha (DW2).

As hinted before, the trial court was satisfied that the offence of murder was proved to the hilt. The learned SRM (Ext. Jur.) found that it

was proved beyond reasonable doubt that the deceased's death was unnatural and that the appellant was the perpetrator. In convicting the appellant, the learned SRM (Ext. Jur.) relied on the oral and written dying declaration which he found to have been corroborated by PW1, PW2, PW3, PW4 and PW5. He also found that the appellant was properly identified basing on the evidence of PW3 and PW4 who said that they were able to see the deceased with the help of bright moonlight.

Aggrieved, the appellant has fronted eight grounds of appeal but for reason which will be apparent shortly, the determination of this appeal turns on a different ground outside the appellant's memorandum of appeal.

When the appeal was called on for hearing, the appellant was represented by Mr. Onyango Otieno, learned advocate whereas the respondent Republic had the services of Messrs. Tawabu Yahaya Issa and Isihaka Ibrahim Mohamed, learned State Attorneys.

At the outset, Mr. Isihaka intimated to the Court that he had a point of law which he needed to raise which was sufficient to dispose of the appeal. He contended that, the learned SRM (Ext. Jur.) did not properly sum up the case to the assessors. In elaboration, he submitted

that, though it was his duty after the closure of the case for both sides to explain to the assessors the vital points of law in the summing up notes, the learned trial SRM (Ext. Jur.) did not do so. He pointed out such points as the evidence of the dying declaration, visual identification and the appellant's defence of alibi preceded by a notice that was given during preliminary hearing, but such points of law were not explained to the assessors. To fortify his argument in relation to the identification evidence, the learned State Attorney referred us to the case of **Yusufu Sayi and 2 Others v. Republic**, Criminal Appeal No. 58 of 2017 (unreported) referring to the case of **Raymond Francis v. Republic** [1994] TLR 100 where it was stated that:

> *"It is elementary that a criminal case whose determination depends essentially on identification, evidence on condition favouring a correct identification is of utmost importance."*

The learned State Attorney contended that in the matter at hand, the SRM (Ext. Jur.) just reproduced the evidence from both sides and the advocate's submissions without more.

In this regard, Mr. Isihaka argued that, this omission vitiated the summing up and the judgment rendering them a nullity. Under the circumstances, he contended that the remedy would have been to quash

the conviction and set aside the sentence and remit the file back for re-summing up and re-composition of the judgment. However, referring to the case of **Marius Simwanza and Another v. The D.P.P,** Criminal Appeal No. 589 of 2017 (unreported), he argued that after perusing the evidence on the record of appeal, he was of the view that the matter was not fit for remittance to the trial court for re-summing up and re-composition of the judgment. He, therefore, urged the Court to invoke section 4 (2) of the Appellate Jurisdiction Act (the AJA), and allow the appeal and release the appellant from custody.

In response, Mr. Onyango was in agreement with what the learned State Attorney. He submitted that the learned SRM (Ext. Jur.) did not address the assessors on the vital points of law in the summing up. He also agreed with his counterpart's proposition for the nullification of the summing up notes, quashing the conviction and setting aside the sentence with an order releasing the appellant from prison.

Having considered the concurrent submissions of both counsel, our stating point would be to point out that before the amendment of section 265 of the Criminal Procedure Act (the CPA) through the Written Laws (Miscellaneous Amendments) Act, 2022 (Act No.1 of 2022), all criminal trials in the High Court and by extension in The Resident

Magistrate's Court with extended jurisdiction were mandatorily required to be conducted with the aid of at least two assessors. This requirement was provided for under the said section 265 (1) of the CPA. Since the trial of the matter under consideration was conducted before the amendment, section 265 (1) of the CPA is relevant in the determination of the issue raised by the learned State Attorneys and the concurring submissions.

Apart from that, section 298 of the CPA requires the trial Judge to sum up to the assessors the evidence of both the prosecution and defence after both have closed their respective cases. It states as follows:

> *"When 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."*

From the above cited provision of the CPA, the trial judge is required to sum up to assessors the substance of the evidence of both prosecution and defence sides and to explain the specific vital questions

of law involved in the case. Much as the cited provision would seem to be discretional, it is a settled practice for the trial Judge to sum up the evidence to the assessors on all essential elements of the offence. In the case of **Mulokozi Anatory v. Republic,** Criminal Appeal No. 124 of 2014 (unreported) the Court stated as follows:

> *"We wish first to say in passing that though the word "may" is used implying it is not mandatory for the trial judge to sum up the case to the assessors but as a matter of long established practice and to give effect to s. 265 of the Criminal Procedure Act that all trials before the High Court shall be with the aid of assessors, trial judges sitting with assessors have invariably been summing up the cases to the assessors..."*

Summing up is important to enable the assessors to give a meaningful opinions on the matter before them. (See for instance, **Othman Issa Mbande v. The D.P.P,** Criminal Appeal No. 95 of 2013 and **Masolwa Salum v. Republic,** Criminal Appeal No. 206 of 2014 (both unreported). A meaningful summing, entails explanation on the substance of evidence as well as pointing out specific vital points of law in the case - See for instance: **John Mlay v. Republic,** Criminal Appeal No. 216 of 2007 (unreported). To the contrary, where there is in

adequate summing up to assessors, the opinion of the assessors cannot be said to have been based on proper apprehension of evidence of witnesses in relation to the principles of law governing reliability of such evidence. On this, we are guided by the case of **Geofrey Ntapanya and Another v. Republic**, Criminal Appeal No. 232 of 2019 (unreported) citing a decision of the defunct Court of Appeal for Eastern Africa in the case of **Washington Odindo v. Republic**, [1954] 21 EACA 392 where it was stated as follows:

> *"... 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 opinions is invariably reduced."*

[See also: **Mbalushimana Jean-Marie Vienney @ Mtokambali v. Republic,** Criminal Appeal No. 102 of 2016, **Samitu Haruna @ Magezi v. Republic,** Criminal Appeal No. 429 of 2018 and **Julius Mgoba v. Republic,** Criminal Appeal No. 508 of 2020 (all unreported).

In the matter under consideration, the trial SRM – (Ext. Jur.) simply summarized the evidence for both prosecution and defence after they had closed their cases. Despite the fact that the learned State

Attorney pointed out that the trial SRM – (Ext. Jur.) did not at all explain the vital points of law, we note that he explained some vital elements relating to malice aforethought, circumstantial evidence, the onus and standard of proof. However, the assessors were not addressed on how the evidence related to the specific aspects of the law relevant to the case. This is so because, there was oral evidence of dying declaration as per PW2, PW3, PW4 and PW5 evidence as well as written which was adduced by PW5 and tendered in court as Exh. P2. This evidence was discussed at length in the judgment by the trial SRM (Ext. Jur.) and heavily relied in convicting the appellant. However, he did not explain to the assessors its relevance in the case to mount conviction.

Moreover, there was an issue of identification of the appellant by the deceased considering that the offence was alleged to have been committed at night. In cases depending on visual identification, there is a threshold on conditions favoring a correct identification which has to be met. It is plain that, in his dying declaration, the deceased did not explain the light that enabled him to identify the appellant. PW3 and PW4 testified that they were able to see the deceased with the aid of bright moonlight. However, like the first element, the assessors were not addressed on what factors should be taken into account in testing

identity of a suspect during night. Similarly, the trial SRM (Ext. Jur.) did not explain to the assessors the application of the defence of alibi which was relied upon by the appellant although he discussed it in the judgment and disregarded it.

In their opinions which based on the trial SRM (Ext. Jur,)'s summing up, the assessors returned a verdict of guilty of murder against the appellant having been allegedly mentioned to the witnesses by the deceased.

Since the assessors were not addressed on such points of law as clearly reflected in their opinions they gave after the summing up, it cannot, therefore, be said that the trial court tried the case with the aid of assessors within the spirit of section 265 of the CPA.

It is our view that, since the involvement of the assessors was a mandatory requirement in trials in the High Court, it follows that the omission to do so was fatal as it had the effect of rendering the trial a nullity (see **Abdallah Bazaniye and Others v. Republic**, [1990] TLR 41; **Kinyota Kabwe v. Republic,** Criminal Appeal No. 198 of 2017; **Batram Nkwera @ Mhesa v. The Director of Public Prosecutions**, Criminal Appeal No. 567 of 2019 and **Daniel Ramadhani Mkilindi @**

Abdallah @ Dulla v. Republic, Criminal Appeal No. 16 of 2019 (all unreported).

We, therefore, agree with the submissions made by both learned counsel that the trial was rendered a nullity.

As to the way forward, having examined the record of appeal, particularly the dying declaration and on how the deceased identified the appellant, we find that it is wanting. Though the deceased mentioned the appellant to be his assailant, he did not mention the type of light and its intensity which enabled him to identify him. Regarding light, it was PW3 and PW4 who said there was sufficient moonlight which enabled them to see the deceased being injured and the intestine protruding outside the stomach. We do not see the linkage between the light that was used by PW3 and PW4 to see the injured deceased and the deceased identifying the appellant.

Mindful of the oft quoted decision in **Fatehali Manji v. Republic,** [1966] E.A 343 in the light of the glaring gaps in the evidence on record, we agree with the learned counsel that ordering a retrial will not be in the interest of justice as it may offer the prosecution an opportunity to fill gaps in its evidence.

Consequently, in terms of section 4 (2) of the AJA, we nullify the proceedings in Criminal Sessions Case No. 7 of 2020, quash the conviction and set aside the sentence meted out against the appellant. In view of the foregoing, we order that the appellant be released forthwith from prison unless he is otherwise held for other lawful cause(s).

DATED at **MUSOMA** this 10th day of June, 2023.

R. K. MKUYE
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

The Judgment delivered this 12th day of June, 2023 in the presence of the appellant in person and Mr. Zalubaber Ngowi and Jonasi Kivuyo, both learned State Attorneys for the respondent/Republic, is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

C. M. MAGESA
DEPUTY REGISTRAR
COURT OF APPEAL