

**IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA**

(CORAM: LILA, J.A., FIKIRINI, J.A, And MURUKE, J.A.)

CRIMINAL APPEAL NO. 271 OF 2021

MATONGO MATHAYO@MGORI.....1st APPELLANT

JUMA MSAFIRI @STEPHANO.....2nd APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania, at Geita)

(Rumanyika, J.)

dated the 25th day of March, 2021

in

Criminal Sessions No. 221 of 2015

.....

JUDGMENT OF THE COURT

11th July & 20th 2023.

FIKIRINI, J.A.:

The appellants, Matongo Mathayo @Mgori and Juma Msafiri @Stephano, hereinafter referred to as the 1st and 2nd appellants were convicted, after being jointly charged, before the District Court of Geita, at Geita with one count of murder contrary to section 196 and 197 of the

Penal Code Cap. 16 [R.E. 2002 now 2022] (the Penal Code). They were each sentenced to suffer death pursuant to section 197 of the Penal Code.

Protesting their innocence on 19th July 2021, they filed a joint memorandum of appeal containing eight (8) grounds. This was followed by a supplementary memorandum of appeal lodged by the 1st appellant on 27th June, 2023.

Before embarking on determining this appeal, we find it necessary to briefly narrate the facts and evidence leading to the appeal before us. On 21st March, 2014, Hadija Lukunyangu (now deceased) and Tabu Busagara were walking back home from the local market (gulio) to Luhuha village, at around 8.00 pm. On their way, they met the suspects while passing a bushy area. The 1st appellant is said to have cut the deceased, who was seven (7) months pregnant, with a machete (panga) on the head. The cut broke the skull and caused the brain to ooze out. The deceased died on the spot. Conversely, Tabu Busagara (PW1) was asked to close her eyes before she was hit with a knife. She lost conscious. When she regained conscious, she reported the incident to the street chairman.

The deceased's body was taken to her home and Venance Nganda (PW2) conducted an autopsy on 22nd March, 2014 at Luhuha village and prepared a post-mortem report which was admitted in evidence as exhibit P1. Since the matter had already been reported to Police, F.3040 D/Cpl Joseph (PW3) visited the scene of the crime after being informed and assigned to do so by the Regional Crimes Officer (RCO). At the scene, he drew a sketch map of the scene of the crime. The sketch map was admitted in evidence as exhibit P2. The appellants were arrested and D.6944 D/Sgt Emmanuel recorded their cautioned statements on 7th June, 2014 at noon. The cautioned statements were admitted in evidence as exhibits P3 and P4. Another set of exhibits admitted was exhibits P5 and P6, the appellants' extra judicial statements.

The prosecution case was closed and the appellants were invited to mount their defence after the trial Judge found out that they had a case to answer. In their defence, the appellants, who were the sole defence witnesses, denied committing the offence they were charged with.

After closing the defence case and summing up to assessors, the Court pronounced its judgment on 25th March, 2021. In its judgment, the

trial Judge did not agree with the assessors' opinion that the prosecution case had not been proved beyond reasonable doubt, the standard required in law. However, he admitted that the prosecution case hinged on the accuseds' repudiated cautioned statements as there was no visual identification or other evidence. The trial Judge also acknowledged that unless the repudiated confession was corroborated, such evidence could not be solely relied on to base conviction. He, nonetheless, went ahead and convicted the appellants. As intimated earlier the appellants were aggrieved and preferred this appeal.

However, for the reasons to be apparent soon, the grounds of appeal will not be reproduced.

On 11th July, 2023, when the appeal came on for hearing, Mr. Cosmas Tuthuru and Mr. Fidelis Cassian Mteuele, learned advocates, appeared representing their respective parties, the 1st and 2nd appellants. On the respondent's part, Ms. Rehema Mbuya, learned Senior State Attorney, Ms. Naila Chamba and Mr. Deogratius Rumanyika, both learned State Attorneys represented the respondent, Republic.

Before commencing the hearing, we wanted parties to address us on the propriety of the judgment subject of the present appeal. After differing with the assessors' in their opinion, though not binding on the Judge as per section 298 (2) of the CPA, the issue we found requiring parties' input was: *"whether the trial Judge analyzed and evaluated the evidence on record, by giving his reasons warranting the conviction reached and in a way assigning the reasons for his disagreement with the assessors."*

And if the findings are negative, what should be the way forward?

Getting the ball rolling was Mr. Tuthuru. He contended in the admission that the trial court's judgment was not in line with the dictates of section 312 of the Criminal Procedure Act, Cap. 20 [R. E. 2002 now 2022] (the CPA). He went on to submit that there were elements of the offence which required to be proved, analysis and evaluation accompanied with reasons for the decision, reflecting why he disagreed with the assessors' opinion. All these did not feature in the judgment. The Judge's decision was essentially based on his own opinion, not supported by the evidence on record.

Under the circumstances, Mr. Tuthuru suggested two alternatives as the way forward. *One*, is that the record be remitted to the trial court to allow a fresh judgment to be composed. And, if the Judge is no longer in the High Court, then the record be placed before the Judge Incharge for reassignment to another Judge, who should then compose a fresh judgment. *Two*, for this Court to step in the shoes of the trial court, analyze and evaluate the evidence and arrive at its own decision.

On his part, Mr. Mteweale, along the same line, admitted that despite illustrating seven (7) elements of the cautioned statements, which had been repudiated, the trial Judge proceeded without analyzing or evaluating the evidence on record. The judgment, therefore, misses the worth of being a valid or legal one. On the way forward, like Mr. Tuthuru, Mr. Mteweale urged us to remit the record to the trial court to allow a fresh judgment to be composed.

Ms. Mbuya, likewise, shared the position her colleagues took that the judgment is lacking, as it had no issues framed or answered and no reasons given for the decision reached, in line with the requirement of

section 312 of the CPA. She suggested remitting the record back to the High Court to permit a fresh judgment to be composed.

In principle, we agree with counsel for the parties' submissions that prior to the Written Laws (Miscellaneous Amendments) Act, No. 1 of 2022, which amended section 265 of the CPA, it was a mandatory requirement that the trials before the High Court were to be with the aid of assessors. The provision provides thus:-

"265. All trials before the High Court shall be with the aid of assessors, the number of whom shall be two or more as the court thinks fit." [Emphasis added]

When hearing Criminal Session No. 221 of 2015, the trial Judge had to and did sit with three assessors. That being the case, in terms of section 298 (1), the Judge was obliged to sum up to the assessors the evidence for the prosecution and defence and instruct them on the legal points involved. From there, the trial Judge would be ready to receive and record assessors' opinions.

Despite receiving the assessors' opinion pursuant to section 298 (2) of the CPA, the Judge is not bound by their opinions. For clarity, the provision is reproduced below:-

*"298 - (2) The judge shall then give judgment, but, in doing so, **shall not be bound to conform to the opinions of the assessors.**" [Emphasis Added]*

After receiving the assessors' opinions, the Judge must compose a judgment. The written court judgment presupposes analysis and evaluation of the evidence by both the prosecution and the defence, plus the exhibits produced during the hearing. And it must, in all regards, comply with section 312 (1) of the CPA. The said provision provides thus:-

"312.-(1) Every judgment under the provisions of section 311 shall, except as otherwise expressly provided by this Act, be written by or reduced to writing under the personal direction and superintendence of the presiding judge or magistrate in the language of the court and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer as of the date on which it is pronounced in open court."

The following elements are expected to feature in any court authentic written judgment: **one**, it must be in the language of the court, **two**, must contain the point or points for determination or issues, **three**, the decision reached, **four**, the reasons for the decision, **five**, the judgment must be signed by the presiding judge or magistrate even if the same has been reduced to writing under the personal direction and superintendence of the presiding judge or magistrate.

While we appreciate that each, judge and/or magistrate have their own writing style, the emphasis is that the judgment must contain the pointed-out elements to stand the test of authenticity. In the case of **Mzee Ally Mwinyimkuu @ Babu Seya v. R**, Criminal Appeal No. 499 of 2017 (unreported), quoting from the decision in **Amiri Mohamed v. R**, [1994], expounding on this, the Court had this to say:-

*"Every magistrate or judge has got his or her own style of composing judgment. Some judgments are more logically written, some are more neatly thoughtful, some are more compendious, and so on. **What vitally matters is that the essence should be there, and this includes critical***

analysis of both the Prosecution and Defence."

[Emphasis added]

In the present appeal, even though the assessors' opinion does not bind the Judge, it was still expected in composing his judgment, the Judge would analyze and evaluate the evidence and give reasons for his decision. The analysis, evaluation and reasoning process reflected in the composed judgment would have shown why he disagreed with the assessors' opinions. Nevertheless, this was not the case and with due respect, what we found on pages 147 and 148 of the trial court judgment, in our view, does not come close to authentic court judgment. To grasp our concern, we shall let the record speak for itself:-

*"It is trite law that unless the repudiated confession was corroborated or it was but true, such evidence cannot solely convict (case of **Mkubwa Said Omary v. SMZ** (1992) TLR 365 (CA) and **Tuwamoi v. Uganda** (1967) EA 84.*

It is common knowledge that just like socio-economic circumstances were never static, criminology and victim ology are not in isolation much as in my considered opinion if courts shall not do what had never been said by the law, the development of jurisprudence shall stand still while the other forces shall in no way continue forging it way through.

It means therefore if a conviction was likely to base on repudiated or retracted but uncorroborated confession, the court shall always observe the following criteria; (i) at times human psychology was complex than human himself (ii) if the provisions of Section 27 (3) of the Evidence Act Cap 6 RE. 2019 were taken whole sale the purposes of the legislation would have been defeated because most likely even some genuine and freely confessed subjects would have always take the advantage. (iii) if, with all costs the police recording officer only intended to have the suspect's confession why all such detailed, lengthy and consistently logical stories? For whose interests! (iv) where, during trial with in trial the need raised, justice of the peace shall, on balance of probabilities proved unless the latter was proven an agent of the policemen, and where the two co-existed, the accused's extrajudicial statement shall substantiate contents of the impugned cautioned statement (v) given its nature, the scope and effects, chances of the offence charged most likely falling under the category of organized and crime rackets (vi) changes of the innocents being convicted or criminals get out of the courts free. The categories not closed.

It is for these reasons that I would part a company with the lady and gentlemen assessors.

Now that the case has met the above stated test and threshold, the accused are convicted for murder c/s 196 of the Code as charged.”

From the excerpt, it is clear that neither the prosecution, the defence nor exhibits tendered and admitted namely exhibits P1-the post mortem report, P2-sketch map of the scene of the crime, P3-cautioned statement of the 1st appellant, P4-cautioned statement of the 2nd appellant, P5-the 1st appellant extra judicial statement and P6-the 2nd appellant extra-judicial statement, were analyzed and evaluated to justify the decision reached which would have also depicted why he was in disagreement with the assessors' opinions.

Instead, the trial Judge dealt with extraneous matters in deciding the case, leaving aside the available evidence on record. We find the decision does not align with the requirements of section 312 (1) of the CPA. For the interest of justice, and according to section 4 (2) of the Appellate Jurisdiction Act, Cap. 141 R. E. 2019, nullify the trial court's judgment in Criminal Sessions No. 221 of 2015.

Consequently, we order the record to be remitted to the trial court before the Judge Incharge for reassignment before another Judge who should compose a fresh judgment. In the meantime, the appellants should remain in custody.

It is so ordered.

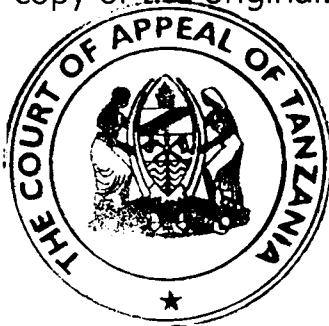
DATED at MWANZA this 19th day of July, 2023.


S. A. LILA.
JUSTICE OF APPEAL

P. S. FIKIRINI.
JUSTICE OF APPEAL

Z. G. MURUKE.
JUSTICE OF APPEAL

The Judgment delivered this 20th day of July, 2023 in the presence of Mr. Cosmas Thuthuru, learned Counsel for 1st Appellant also holding brief for Mr. Fidelis Mteweale for the 2nd Appellant and Ms. Stella Minja, learned State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.




S. P. MWASEJE
DEPUTY REGISTRAR
COURT OF APPEAL