IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

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

CRIMINAL APPEAL NO. 459 OF 2021

SANDA KISHOSHA @ KARUTO .....1ST APPELLANT

PENDO LUMWECHA @ MHOJA.....2ND APPELLANT

MASUMBUKO DAUD @ FUMAKULE.....3RD APPELLANT

BULABO MALEJIWA @ KUGULU.....4TH APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Geita)

(Rumanyika, J.)

dated the 25th day of March, 2021

in

Criminal Sessions Case No. 233 of 2016

.....

JUDGMENT OF THE COURT

23rd & 30th August, 2023

MWANDAMBO, J.A.:

The High Court sitting at Geita, tried and convicted the appellants on the information of murder and sentenced them accordingly. The particulars in the information alleged that, on 13/03/2014 at Rumasa Village, Chato District in Geita Region, the appellants jointly and severally murdered one Tabu s/o Misungwi to which they pleaded not guilty. They are now before the Court in this

appeal challenging their conviction on grounds, amongst others, that case against them was not proved beyond reasonable doubt.

The facts upon which the prosecution relied in charging the appellants are fairly brief. Tabu s/o Misungwi met her death on the evening of 13/03/2014 in the hands of thugs who inflicted multiple injuries on her chest and other parts of the body using machetes. The thugs disappeared thereafter after robbing from the deceased a sum of TZS. 490,000.00 allegedly as part of the proceeds of sale of a shamba in a transaction which occurred earlier in the day. An autopsy conducted subsequently revealed that the cause of death was severe haemorhage from wounds. The appellants were arrested later in June 2014 upon a tip from a person allegedly in the company of the culprits on the material date. Upon interrogation, the culprits were recorded to have confessed to kill the deceased through their cautioned statements said to have been made before the police.

During the trial, the prosecution produced five police officers as witnesses to prove the case against the appellants. Four of the witnesses; PW1, PW3, PW4 and PW5 produced cautioned statements of the fourth appellant (exhibit P1), second appellant (exhibit P3),

third appellant (exhibit P4) and first appellant (exhibit P5) respectively. A sketch map of the scene of crime drawn by E4119 D/Sgt Stephen who testified as PW2 was admitted in evidence as exhibit P2. At the end of their testimony, the prosecution closed its case which was followed by the trial court's ruling that the appellants had a case to answer before they entered their respective defences.

Essentially, the appellants' defence was a complete denial of involvement in the accusations against them and retracting from their cautioned statements. After the conclusion of the trial, the trial judge made summing up notes to the lay assessors who sat with him. Having addressed them generally on the vital ingredients of the offence and burden of proof, the trial judge addressed the lay assessors specifically on the nature of the evidence relied on by the prosecutions being repudiated cautioned statements which required corroboration to sustain conviction.

Guided by the trial judge's direction on the nature of the evidence, assessor No. 1, one Jumanne Nkana opined against a finding of guilt because no eye witnesses testified during the trial. The second assessor is recorded to have concurred with assessor No.

1 whereas the third one is recorded to have concurred with the first two assessors considering that the first and second appellants where arrested some months later after the killing.

In its judgment, the trial court revisited the prosecution evidence hinged on the appellants' repudiated cautioned statements and the need for corroboration consistent with his address to the lay assessors. Even though there was no oral evidence to corroborate the repudiated cautioned statements, the trial judge patted ways with the lay assessors' verdict of not guilty. He predicated his disagreement with what he called six principles which needed to be observed in approaching the evidence through repudiated confession. In particular, the trial judge took the view that section 27 (3) of the Evidence Act cannot be taken wholesale lest the whole purpose of the legislation is defeated. On the other hand, the trial judge introduced another aspect; common intention as a basis for convicting the fourth appellant by his failure to report his co-accused. In the end, the trial judge entered a finding of guilty against the appellants followed by convictions and mandatory death sentences.

Aggrieved, the appellants have preferred the instant appeal upon a joint memorandum of appeal containing 12 grounds of appeal. Subsequently, the second and third appellants lodged their respective supplementary memoranda of appeal which each wanted to rely on in assailing the impugned judgment. However, the determination of the appeal turns on an issue outside the three memoranda of appeal except ground three in the third appellant's supplementary memorandum of appeal.

At the hearing, Messrs. Anthony Nasimire, Vedastus Laurean, Kassim Gilla and Fidelis Cassian Mtewele, learned advocates appeared representing, respectively, the first, second third and fourth appellants. Mr. Castuce Ndamugoba, learned Senior State Attorney represented the respondent Republic. Before the counsel commenced their submissions for and against the specific grounds of appeal each had informed the Court to argue, it became imperative to invite them to address the Court on the propriety of the summing up notes to the assessors on the face of the judgment convicting the appellants.

Mr. Nasimire, with whom the rest of the appellants' learned advocates agreed, was emphatic that the trial judge correctly

addressed the lay assessors on the nature of the evidence the prosecution relied, repudiated cautioned statements on the basis of which the assessors returned a verdict of not guilty. However, the learned advocate argued and rightly so in our view that despite the absence of corroborative evidence, the trial judge grounded conviction on some principles and theories of law on which the assessors were not addressed before giving their opinions. Besides, it was Mr. Nasimire's further submission that, in any case, the assessors' opinions were received in contravention of the provisions of section 298 (1) of the Criminal Procedure Act (the CPA) which require each assessor to give his opinion individually. Mr. Nasimire pressed that, the variance between the summing up notes and the judgment was fatal to the appellants' convictions which warranted quashing them and setting aside sentences. The learned advocate ruled out a retrial due to absence of evidence to corroborate the repudiated confessional statements let alone the possibility of giving the prosecution room to rectify the infractions in its case.

Apart from subscribing to the submission made by Mr. Nasimire, Mr. Gilla addressed the Court on ground three in the third appellant's supplementary memorandum of appeal. In elaboration, he drew our

attention to the objection against admission of the third appellant's cautioned statement predicated upon two limbs; non-compliance with section 57 (4) (a) and (b) of the CPA and, section 27 (3) of the Evidence Act. The learned advocate argued and it is indeed evident that, whereas the trial court conducted a trial within a trial on the voluntariness of the said statement and made a ruling at the end of it, the objection pegged on section 57 (4) (a) and (b) of the CPA was not dealt with contrary to the indication to do so at page 47 of the record of appeal.

On the other hand, the learned advocate argued that the reasons for overruling the objection against the admission of the first appellant's cautioned statement (exhibit P5) were not given by the trial judge despite his indication to give them in a ruling on a case to answer or judgment as shown at page 54 of the record of appeal. It was contended by the learned advocate that failure to give reasons was prejudicial to both the prosecution and the defence as a result of which, the appellants repeated their objections in their defences. The Court's decision in **Mayamba Majarifu & 3 Others v. Republic**, (Criminal Appeal No. 596 of 2017) [2021] TZCA 743 (1 December

2021, TanzLii) was cited to argue that such practice was out of the ordinary.

As to the way forward, like Mr. Nasimire, Mr. Gilla ruled out the possibility of a retrial lest the prosecution is given room to fill in gaps in its case. He thus touted for the Court's exercise of its revisional power under section 4 (2) of the Appellate Jurisdiction Act (the AJA) by quashing convictions and setting aside sentences and releasing the appellants.

On top of his submissions on ground three, Mr. Gilla brought to our attention the trial court's omission to address the appellants on their rights after a ruling on a case to answer in contravention of section 293 (2) of the CPA. We respectfully agree that was an irregularity which should not be condoned but we are far from saying that the appellants were prejudiced in their defence considering that they were represented by advocates and gave evidence in defence. There is no indication that any of them was prevented from calling a witness to testify for him. Otherwise, Messrs. Laurean and Mtewele for their part subscribed to the submissions made by Messrs. Nasimire and later by Gilla including the way forward.

In his reply, Mr. Ndamugoba for his part conceded the shortcomings in the summing up notes as well as failure to give reasons on the objections against admission of cautioner statements pointed out by Mr. Gilla. Mr. Ndamugoba argued that failure to give reasons amounted to unfair trial warranting nullification of the trial. Otherwise, like the appellants' learned advocates, Mr. Ndamugoba did not consider retrial viable under the circumstances.

In view of the position taken by Mr. Ndamugoba, the appellants' learned advocates led by Mr. Nasimire reiterated their stance that the circumstances in the instant appeal and the interest of justice did not warrant a retrial but releasing the appellants.

Having heard concurring submissions from the learned counsel and examined the record of appeal, we cannot but agree with them that the trial and the ultimate conviction of the appellants were not free from irregularities. Without any disrespect to the trial judge, the said irregularities are too glaring to be condoned as we shall endeavor to demonstrate shortly.

The first relates to summing up notes to the lay assessors. It is common ground that the summing up notes were inadequate. We

entirely agree with the learned advocates considering the Court's decisions in this regard. In particular, **John Mlay v. Republic**, Criminal Appeal No. 216 of 2007 (unreported) the Court underscored the purpose of summing up being to enable the assessors to arrive at correct opinions. While realising the fact that summing up is a matter of personal style, it stressed that a proper summing up, must contain all essential elements in a case, that is; all ingredients of the offence, burden of proof and the duty of the prosecution to prove its case beyond reasonable doubt, elaboration on the cause of death, malice aforethought and main issues in the case including, but not limited to the nature of the evidence, credibility of witnesses etc. With respect, the summing up notes appearing at pages 69-75 of the record of appeal miss such vital point as an explanation of what it meant by common intention amongst the appellants which was the basis of grounding conviction against the fourth appellant.

The foregoing aside, it is evident that the trial judge explained to the lay assessors that the case for the prosecution was not hinged on any direct or circumstantial evidence. Mindful of that, he directed the assessors that the repudiated cautioned statements of the appellants implicating each other required corroboration. It is plain

from the record that, upon such direction, the lay assessors were invited to state their opinions in terms of section 298 (1) of the CPA. Apparently, although section 298 (4) of the CPA permits assessors to retire and consult each other before stating their opinions, there is no indication that this is what transpired in the instant appeal. The record shows at page 75 that, the lay assessors stated their opinions immediately after the trial judge had addressed them. For easy appreciation of what transpired after such invitation, we reproduce an extract of the relevant part from the record:

> ***Assessor 1****: The accused are not liable because no one of eye witnesses appeared in Court. However, the 4th accused is not liable much as he did not execute it.*
>
> ***Assessor 2:*** *As per assessor number one (1).*
>
> ***Assessor 3****: as per assessors 1 and 2. The accused having been arrested some months later* [at pages 75 and 76 of the record].

It is evident from the above that, it is only Assessor No. 1 who stated his opinion in terms of section 298 (1) of the CPA. The rest did not state any opinion notwithstanding an indication that Assessor No.

2 is recorded to have implicitly agreed with Assessor No. 1 and that Assessor No. 3 agreed with Assessors 1 and 2. That was, with respect irregular considering that there is no evidence of any consultation amongst them regardless of the fact that the lay assessors could have, nonetheless, had similar opinion at the end of the day.

Despite of the above shortcoming, we shall have to accept that the lay assessors returned a unanimous verdict of not guilty and not surprisingly so for want of independent evidence to corroborate the repudiated confessions. Be it as it may, although the trial judge was not bound by the assessors' opinions, the reason for his disagreement is, with respect, not amongst the aspects explained to the assessors. For easy appreciation, we find it necessary to extract part of the trial judge's reasoning:

> *In this case there was, with respect to nature, the mode of execution and circumstances of the repudiated confession no corroborative evidence. I think where its pace, nature, scope and mode of criminology and victimology, therefore like it is the case here, where new categories of criminal rackets even ran faster than the socio economic circumstances especially where the invented*

Electronic Evidence Act No. 15 of 2015 in their absolute discretion the courts needed also to more seriously engage human psychology of the police recording officers and suspects provided where a conviction is likely to lie on a repudiated confession the following principles shall be observed: - (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 within trial the need raised, justice of the peace shall, on balance of probabilities proved unless the later 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 failing under the category of organized and crime rackets (vi) chances of the innocents being

convicted or criminals get out of the court free. The categories not closed. [at pages 106 and 107 of the record]

It will be recalled that the trial judge had directed the lay assessors of the nature of the prosecution evidence being, appellants' repudiated confessions which could not be acted upon without independent corroborative evidence. Indeed, the trial judge was very specific to the lay assessors on what he expected from them; a verdict of guilty if they were satisfied that there was evidence to corroborate the repudiated confessional statements and vice versa. As seen earlier, discarding the manner in which each assessor reacted after the trial judge's invitation to state his opinion, we are constrained to agree with Mr. Nasimire in his submission. It is beyond any dispute that the trial judge's disagreement with the assessors was based on legal principles and theories of law which were not explained to the lay assessors beforehand. The lay assessors stated their opinion unaware of the legal principles and theories of law featuring in the judgment. We need not overemphasise the purpose of quality summing up notes but echo a statement of the defunct Court of

Appeal for Eastern Africa in **Washington s/o Odindo v. R** [954] 21 EACA 392 thus:

> *"The opinions of the assessors can be of great value and assistance to the trial judge but only if they fully understand the facts of the case before them in relation to the relevant law."*

It is glaring that the summing up notes and the judgment are, with respect, the opposite of the above principle. There is a clear departure from matters explained to the assessors for their non-binding opinion and the reasons behind the appellants' convictions. It is trite law that the inadequacy in the summing up notes is fatal because the assessors cannot be taken to have participated in the trial as required by section 265 of the CPA prior to its amendment vide Written Laws (Miscellaneous Amendments) Act No. 1 of 2022. The net effect was that, since the trial judge convicted the appellants on the basis of aspects on which the lay assessors were not addressed, such conviction was, but a nullity. We shall revert to the way forward later.

Next we shall consider the third appellant's complaint regarding failure to give reasons on objections against admission of the first, second and third appellants' cautioned statements. The discussion on

this complaint is only necessary for the purpose of determining the way forward in view of our holding on the summing up notes. Mr. Ndamugoba conceded to Mr. Gilla's submission on this complaint to which we respectfully agree. It is plain that the trial judge omitted to give reasons for his decision to overrule an objection against admission of the second appellant's cautioned statement (exhibit P3) and yet he relied upon in convicting him. The same applies to exhibit P5, the first appellant's cautioned statement whose admission was objected on ground that it was not taken voluntarily. The record shows that the trial judge conducted a trial within a trial to determine its voluntariness which was quite in order. At the end of it he overruled the objection but reserved reasons to be incorporated in the judgment. Nevertheless, no such reasons were incorporated in the judgment. Yet, the trial judge relied upon exhibit P5 in convicting the first appellant. Consistent with the Court's holding in **Mayamba Majarifu** (supra), the procedure adopted by the trial judge for deferring reasons after overruling the objections and not giving such reasons in the judgment was unorthodox and no doubt irregular. The effect from such irregularity was discussed by the Court in the above cited decision thus:

> *"We think Mr. Mutalemwa is right in submitting that the appellants were prejudiced because by mounting their defence before knowing the reasons for the decisions in the trials within trial, they were denied relevant information to properly challenge the prosecution case. This, in our view, is what the defunct East Africa Court of Appeal said in Mr.* ***Muraira Karegwa vs. Republic****, (1954) 21 E.A.C. A. 262 at page 264 cited in* ***Bakran v. Republic*** *[1972] 1 EA 92], that "There is obviously a very real danger of prejudice here the defence may be caught on horns of a dilemma..."*

At any rate, the contents of exhibit P5 were not read after it was cleared for admission which was also an irregularity resulting in discarding the exhibit. The cumulative effect of the irregularities pointed out was fatal to the first, second and third appellants' convictions which takes us to the consideration on the way forward after holding that the summing up notes were a nullity.

Luckily, all counsel agree that a retrial is not desirable. We agree with them alive to the time-tested rule behind retrials discussed in **Fatehali Manji v. Republic** [1966] E.A 343 followed by the Court in many of its decisions which we need not mention here. The rule of

thumb is that a retrial shall be ordered where it is in the interest of justice to do so particularly where there is sufficient evidence to sustain conviction and not where such a course of action will give the prosecution undue advantage to fill gaps in its case. It is common cause here that apart from the repudiated confessional statements, there is no other independent evidence to corroborate such statements. Besides, as we have held shortly, had there been such evidence, the admission and reliance upon the first, second and third appellants' confessional statement was highly irregular. That means, ordering a retrial will be an exercise in futility, not in the interest of justice.

To conclude, the inadequacy in the summing up notes coupled with the trial judge's disagreement with the lay assessor was grounded on aspects which were outside the summing up notes, was tantamount to conducting the trial without the aid of assessors. Consequently, in the exercise of the Court's revisional power under section 4 (2) of the AJA, we nullify the trial and the resultant judgment. Having nullified the trial and the judgment, we quash the appellants' convictions and set aside the resultant death sentences.

For the reasons we have endeavored to give, we decline ordering a retrial. Instead, we order the immediate release of the appellants from custody if they are not held therein for any other lawful purpose.

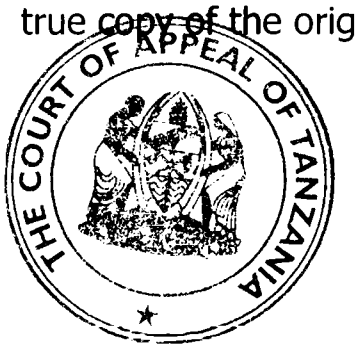
DATED at **MWANZA** this 28th day of August, 2023.

F. L. K. WAMBALI
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

The Judgment delivered this 30th day of August, 2023 in the presence of Mr. Kassim Seleman Gilla, learned counsel for the 3rd Appellant who took brief for Mr. Anthony Nasimire, Mr. Vedastus Laurean for the 1st and 2nd Appellants respectively, Mr. Fidelis Cassian Mtewele for the 4th Respondent, Mr. Castuce Clemence Ndamugoba, learned Senior State Attorney and Mr. John Saimon Joss, 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