IN THE COURT OF APPEAL OF TANZANIA
AT MOSHI

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

CRIMINAL APPEAL NO. 102 OF 2020

JOHN JOSEPH MACHA @ JOIKA..... ..... APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Moshi)

(Gwae, J.)

dated the 20th day of December, 2019

in

Vide Criminal Session No. 43 of 2018

.....

JUDGMENT OF THE COURT

18th & 22nd September, 2023

MUGASHA, J.A.:

The appellant was charged and convicted of the offence of murder contrary to section 196 of the Penal Code (Cap. 16 R.E. 2022). According to the information laid against the appellant, the prosecution alleged that on 16/10/2013, at Kanango Village - Kirua Vunjo within the rural District of Moshi, Kilimanjaro Region, the appellant murdered one Leonarita Ibrahim Macha.

The appellant denied the charge. In order to prove its case, the prosecution paraded seven witnesses. According to the prosecution account, the deceased and his grandson one Nickson Linus Mtenga (PW4) resided in the same homestead. Apparently, PW4 who was eight years old on the fateful incident, was the only eye witness who happened to be at the scene of crime. He gave his account at the age of 14 years. He recalled that, on 15/10/2013 at around 21.00 hrs, while praying with the deceased, the appellant knocked the door and entered into the house, greeted the deceased and asked for food and tea and the deceased obliged and served him accordingly. However, suddenly, he took out a machete from his waist and demanded money from the deceased. As the deceased stood up promising to give out the money, she was attacked by the appellant who slashed her neck and cut off her three fingers of the hand and foot. PW4 further recalled that, the appellant covered the deceased with a mattress, picked her clothes, entered in the kraal and took out the deceased's four sheep.

Thereafter, the appellant set the homestead ablaze whist the deceased body was inside and she was totally burnt. Then, the appellant took PW4 and they disembarked leaving the sheep with an old man they

had met on the way. Upon reaching Mererani, the appellant left PW4 at different residences until when he was spotted and picked by the police as per the evidence of the Investigator PW5 DCpl Gabriel. As news broke on the demise of the deceased, a search was mounted so as to pursue the appellant who was arrested at Mererani on 18/10/2013 and taken to Himo Police Station. PW4 was also found at Mererani.

According to Mary Godfrey Mushi (PW3), after receiving a phone call from unnamed person, she proceeded to Kirua Vunjo and found people gathered at the residence of the deceased whose body was totally burnt. Besides identifying the body of the deceased through special marks on the thighs and face, PW3 suspected the appellant to be the assailant because he used to return from Mirerani and spend nights at the deceased's home. PW3 as well testified that, it is PW4 who narrated to her on the killing incident and what had befallen the deceased. It was also alleged that the missing sheep which belonged to the deceased were found with a militia man who later returned them to the family of the deceased. However, the prosecution witnesses gave a varying account as to where the sheep were found as shall be seen at the later stage of this judgment.

The body of the deceased was taken to the hospital and upon conducting autopsy, the Dr. Nkundui Mndeme (PW6) established that the deceased was burnt to death. However, at the trial, the Doctor testified that the three fingers of the deceased were missing. The appellant who was the sole witness for the defence denied the accusations by the prosecution. He admitted to have been arrested at Mirerani on 17/10/2013 but denied to know PW4. He claimed that the charges were fabricated by PW3 because they had grudges as to the place of burial of their late father.

After a full trial, the assessors returned a verdict of guilty and as earlier stated, the appellant was convicted as charged and given a sentence of death by hanging.

Aggrieved, the appellant has approached the Court raising the following grounds of complaint: -

1. *That, the learned trial Judge erred in law and fact by convicting the appellant based on weak and unreliable visual identification evidence of PW4 a child of 8 years which lacked a prior description of the appellant.*

2. *That, the learned trial Court erred in law and fact by failing to notice that there were contradictions and inconsistencies in evidence adduced by the prosecution witnesses.*
3. *That, the learned trial Judge erred in law and fact by failing to append a signature after taking down the evidence of every witness thus there were no material proceedings upon which the appeal could be determined.*
4. *That, the learned trial Judge erred in law and fact by failing to notice that there were grudges existing between the appellant and his aunt (PW3).*
5. *That, the learned trial Judge was not scrupulous enough to notice that the evidence of PW4 as an eye witness is quite doubtful as he was of eight years old when the incident occurred.*
6. *That, the learned trial Judge erred in law and fact by infringing section 26 of the Written Laws (Miscellaneous Amendment) Act No. 2 of 2016.*
7. *That, the learned trial Judge erred in law and fact by failing to consider the defence of alibi.*
8. *That, the prosecution did not prove the case beyond reasonable doubt.*

The appellant was represented by Mr. Elia Johnson Kiwia, learned counsel whereas the respondent Republic had the services of Ms. Revina

Tibilengwa, learned Principal State Attorney and Ms. Eliainenyi Njiro, learned Senior State Attorney.

Given that the 3rd ground of complaint in the supplementary memorandum of appeal is on a point of law on the propriety or otherwise of the summing up to the assessors, the learned counsel were invited to address it first. Upon taking the floor, it was Mr. Kiwia's submission that the summing up was not properly conducted because the trial Judge did not direct the assessors on vital points of law. On this, it was pointed out that, nothing was explained to the assessors on the meaning of the defence of *alibi*; the ingredients of the offence of murder and as such, they were not capacitated to give informed opinions on the guilt or otherwise of the appellant on the charge of murder. Consequently, it was argued that, the trial was not conducted with the aid of assessor as required by the law. On the way forward, it was Mr. Kiwia's submission that, although the remedy would have been a retrial or fresh summing up, the same is not worthy given the inadequate and weak prosecution account.

In addressing the inadequacies in the prosecution account, Mr. Kiwia contended that, apart from the prevalent contradictions in the prosecution

case, the charge is at variance with the adduced evidence rendering the prosecution case not proved beyond reasonable doubt. He pointed out that, whereas the charge indicates that the killing incident occurred on 16/9/2013, all prosecution witnesses testified that the killing was on 15/9/2013. It was thus, Mr. Kiwia's submission that given that the prosecution did not amend the charge as required by law, the occurrence of the killing incident on 16/10/2013 is at variance with the evidence and thus, the charge was not proved to the required standard. To support the proposition, he cited to us the case of **KANDOLA PAULO KADALA VS REPUBLIC,** Criminal Appeal No. 61 of 2017 and **TUMAINI FRANK ABRAHAM VS REPUBLIC,** Criminal Appeal No. 40 of 2020 (both unreported).

Moreover, it was Mr. Kiwia's submission that, given that PW4 was the sole eye witness, his evidence was not watertight so as to be relied upon to convict the appellant. On this, it was contended that, PW4's evidence is doubtful considering that: **one,** he never mentioned the name of a person who picked him at Mererani; **two,** his evidence that the deceased was slashed on the neck and her three fingers chopped off is not compatible with the autopsy report which shows that the deceased was burnt; **three,**

it is highly improbable that it was not opportune for PW4 to see the body of deceased with chopped off fingers given the insufficient light at the scene and when he returned to Himo after the deceased was buried.

It was also submitted by Mr. Kiwia that, in the absence of the evidence that the appellant was involved in the sheep stealing incident, there is nothing whatsoever to connect him with the killing incident given the contradictory account of PW3 and PW5 on the recovery of the sheep. Whereas PW2 stated that he was entrusted with the stolen sheep in the presence of the police, PW5 the investigator said nothing in his testimony. With this submission, Mr. Kiwia urged us to allow the appeal and set the appellant at liberty.

On the other hand, Ms. Tibilengwa conceded that the summing up was not properly conducted and urged us to order a fresh summing up after quashing and setting aside the summing up notes and the judgment of the trial court. To bolster her argument, she cited to us the case of **MASUMBUKO MAKELEZE @ KOSOVO VS REPUBLIC,** Criminal Appeal No. 433 of 2017 (unreported). In advancing the justification on the remedy of fresh summing, Ms. Tibilengwa submitted that, on record there is

sufficient prosecution evidence to ground the conviction of the appellant on the offence charged.

On the variance of the date of the occurrence of the incident in the charge and evidence, she viewed this as curable because the appellant was aware of the charged offence and made his defence on the case fronted by the prosecution. She as well argued that, the sole account of PW4's on the murder of the deceased is corroborated by PW3 who was told about the killing incident by PW4. On the missing details of injuries in the autopsy report, Ms. Tibilengwa viewed the shortfall to be supplemented by the Doctor's oral account which shows that the three fingers of the deceased were chopped off. Finally, Ms. Tibelengwa reiterated her earlier prayer that the matter be returned to the High Court for a fresh summing up.

In rejoinder, Mr. Kiwia basically reiterated what he had submitted earlier on and urged the Court to set the appellant at liberty given that the charge was not proved to the required standard.

Having carefully scrutinized the record before us, the submissions of the parties and the grounds of complaint, it is not in dispute that, in the summing up, the assessors were not directed on vital points of law such

as, what constitutes the ingredients of the offence of murder; the meaning of malice aforethought and the defence of alibi. That apart, the assessors were not addressed on the status of the evidence of PW4, a child of tender age who witnessed the killing incident at the age of 8 and the essence of his account being corroborated by other prosecution evidence in the charge of murder. Thus, on account of the stated shortfalls, it cannot be safely vouched that the summing up to the assessors was properly conducted to enable them to make informed opinions because they were not in a position to relate the facts of the case with the applicable law which is crucial in having the criminal trial conducted with the aid of assessors. See: **WASHINGTON ODINDO VS REPUBLIC** [1954] 21 EACA 392, in which the erstwhile Eastern Africa Court of Appeal held:

> *"The opinion of 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. If the law is not explained and attention not drawn to the salient facts of the case, the value of the opinion of assessors is correspondingly reduced."*

[See also **TULUBUZYA BITIRO VS REPUBLIC** [1982] TLR and **MASHAKA ATHUMANI MAKAMBA VS REPUBLIC,** Criminal Appeal No. 107 of 2020 and **ELIAS MWAITABILA AND 3 OTHERS VS REPUBLIC,** Criminal Appeal No. 316 of 2019 (both unreported).

Furthermore, it is glaring that during the summing up, the trial judge could have influenced the opinion of assessors as reflected at page 191 of the record of appeal as follows: -

> *"In essence there is a direct evidence in favour of the prosecution which was adduced by PW4, Nickson Linus a child of tender age in connection with this murder case against the accused, taking four sheep owned by the deceased witnessed by PW4 whose evidence in that respect is supported by the testimonies of Mr. Estomih Macha PW2 and Mary d/o Ibrahim, PW3 (corroborative evidence)*
>
> *There is also evidence of expert (PW5 Dr. Mndeme) who tendered PostMortem Report (PE1) establishing and supporting the PW4's testimony that the accused set fire while the deceased's body was in the burnt house and that the deceased was totally burnt."*

It is settled law that, when summing up to the assessors, the trial Judge should as far as possible desist from disclosing his own views, or making remarks or comments which might influence the assessors one way or the other in making up their own minds about the issue or issues being left to them for consideration. This is crucial because the assessors should be made to give their opinions independently, based on their own perception and understanding of the case after the summing up, the Judge makes his views known only after receiving the opinions of the assessors and in the course of considering his judgment in the case. See: **ALLY JUMA MAWEPA VS REPUBLIC** [1993] TLR 231.

In the circumstances, given the vivid flaws surrounding the summing up, the trial was vitiated. On the way forward, the learned counsel parted ways. While Mr. Kiwia urged us to allow the appeal and set the appellant at liberty given the weak prosecution account, Ms. Tibilengwa viewed a fresh summing up to be worthy believing that there is in existence strong prosecution account to sustain the conviction of the appellant on the charged offence. Although the Court has in some of its decisions ordered a fresh summing up, each case has to be determined given its own surrounding circumstances and it is paramount to consider what is in the

interests of justice. Having said so we do not think that, a fresh summing is worthy and we shall explain why.

Besides other evidence gaps, the most crucial is the one touching on the variance of the charge and the prosecution account particularly on the date of occurrence of the offence. According to the information filed, page 58 of the record of appeal reflects as follows: -

> ***"STATEMENT OF OFFENCE:***
>
> ***MURDER*** *contrary to section 196 of the Penal Code [Cap 16 R.E 2002]*
>
> ***PARTICULARS OF THE OFFENCE***
>
> ***JOHN S/O JOSEPH MACHA*** *on the 16th day of October, 2013 at Kirua Vunjo area, within the District of Moshi in Kilimanjaro Region, did murder one* ***LEONARITA W/O IBRAHIM @ LEONARITA W/O IBRAHIM."***

However, the evidence adduced at the trial by five prosecution witnesses shows that the killing incident was on 15/10/2013. In other words, the allegation that the killing incident was on 16/10/2013 as per charge sheet is not supported by the evidence. Whereas Mr. Kiwia argued that in absence of amendment of the charge as to the date when the killing

occurred the charge was not proved beyond reasonable doubt, Ms. Tibilengwa had a different view. She argued that the omission is curable given that the appellant was not prejudiced because he was aware of the date of the commission of the offence and made his defence. To support her proposition, cited to us the case of **HALFAN RAJAB MOHAMED VS REPUBLIC,** Criminal Appeal No. 281 of 2020 (unreported) where the Court relied on the case of **OSWARD MOCHIWA @ SUDI VS REPUBLIC,** Criminal Appeal No. 190 of 2014 as the Court held:

> *"We are satisfied that the error on the charge sheet was inoffensive, it neither prejudiced the appellant nor occasioned any injustice to him. Our view is particularly based on two factors; first, that the appellant did not raise any alibi or similar defence whose effect depended so much on the exactness of the date alleged on the charge as being the date when the offence occurred. And secondly, that the appellant fully focused his defence on what the prosecution witnesses alleged to have occurred on 22nd November, 2008 at the scene of crime."*

With greatest respect, we do not think that the above case cited by the learned Principal State Attorney is applicable in the case under scrutiny.

We say so because while in the case of **HALFAN RAJAB MOHAMED VS REPUBLIC** (supra), the appellant confessed to have committed the offence and did not raise the defence of alibi, in the present case at pages 86 and 87 of the record of appeal the appellant raised a defence of *alibi* that between 15/10/2013 and 17/10/2013 he was at Mirerani where he was arrested and taken to Himo Police Station on 17/10/2013. That apart, from the committal stage which took more than four years before the trial, the date of occurrence of the offence which was made known to the appellant is 16/10/2013 and not 15/10/2013. Given that the prosecution were aware that the incident was on 16/10/2023 and not 15/10/2013, the omission went to the root of the matter and occasioned a failure of justice as it cannot be safely vouched that the appellant was not prejudiced as suggested by Ms. Tibilengwa. Moreover, none of the prosecution witnesses, including PW4 was the eye witness, mentioned the date stated in the information and such state of affairs cannot be attributed to forgetfulness of the witnesses due to lapse of time as viewed by the learned Principal State Attorney because the anomaly is in the charge sheet itself.

Without prejudice to the aforesaid, we earlier intimated to look into the evidence on the stealing of the deceased's sheep to see if it connects

the appellant with the killing incident. We agree with Mr. Kiwia that the sheep stealing incident does not in any way link the appellant with the killing incident. We shall explain. It was alleged that the sheep taken by the appellant were found at the farm of Thomas Masau who was taken to the police and handed over to Estomih John Mchaki (PW1) who later handed over the sheep to the deceased family. However, the evidence of PW5, the investigator, is completely silent as to who was found with the sheep and what action was taken. It was expected that, although Thomas Mchaki is dead, he was made to record a statement at the police intimating the person who took the sheep to his farm place. Given his demise, Thomas Mchaki's statement would have been tendered at the trial by the prosecution in order to corroborate PW4's account who was present at the scene of crime and is alleged to have witnessed the appellant taking the deceased's sheep. As this was not the case, the prosecution case was weakened and we attribute the shortfall to weak investigation given that in this case, life of a human being was lost.

In view of what we have endeavoured to demonstrate, given the variance between the charge and the evidence, a fresh summing to the assessors would not in the circumstances be in the interests of justice.

Thus, the 3rd ground of appeal is merited and it is hereby allowed. Given that the determination of the 3rd ground suffices to dispose of the appeal, we shall not determine the remaining grounds of appeal. We quash and set aside the conviction and the sentence and order the immediate release of the appellant unless held for other lawful cause.

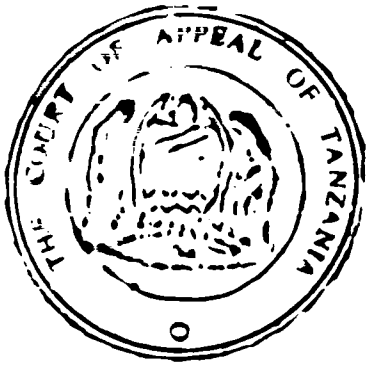
DATED at **MOSHI** this 21st day of September, 2023.

S.E.A. MUGASHA
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

I.J. MAIGE
JUSTICE OF APPEAL

The Judgment delivered this 22nd day of September, 2023 in the presence of Mr. Elia Johnson Kiwia, learned Counsel for the Appellant and Ms. Revina Tibilengwa, learned Principal State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.



D.R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL