**IN THE COURT OF APPEAL OF TANZANIA**

**AT SUMBAWANGA**

**(CORAM: WAMBALI, J.A., KENTE, J.A And MURUKE, J.A.)**

**CRIMINAL APPEAL NO. 433 OF 2019**

**SHABAN S/O MADUA ..... 1ST APPELLANT**

**JUMANNE S/O SHABAN ..... 2ND APPELLANT**

**SHABAN S/O JUMA ..... 3RD APPELLANT**

**VERSUS**

**THE DIRECTOR OF PUBLIC PROSECUTIONS (DPP) ..... RESPONDENT**

**(Appeal from the decision of High Court of Tanzania at Sumbawanga)**

**(Mashauri, J)**

**dated the 21st day of October, 2019**

**in**

**Criminal Sessions Case No. 40 of 2017**

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## JUDGMENT OF THE COURT

25th September & 5th October,2023

**KENTE, J.A.:**

The appellants were tried and convicted by the High Court (sitting at Sumbawanga) on a charge of murder contrary to section 196 of the Penal Code (Cap 16 R.E. 2002, now R.E. 2022). They were subsequently sentenced to the mandatory sentence of death by hanging. The particulars of the offence alleged that, on 26th January, 2015 at Kambuzi Halt Village, within the District of Mlele in Katavi Region, the appellants murdered John Ntaja who was a nightwatchman at Kambuzi Halt Village

Dispensary. The case against the appellants which was wholly based on circumstantial evidence was briefly to the following effect.

During the morning hours of 26th January, 2015 when Nemes Nderema Yona (PW8) a nurse and mid-wife then stationed at Kambuzi Halt Dispensary reported at work, she was surprised to find small clusters of people who were unusually gathered outside the dispensary. Upon inquiry, PW8 was told that six solar panels which had recently been installed at the rooftop of the dispensary were stolen and a night-watchman murdered by some unknown persons in cold blood. Dutifully and immediately, PW8 reported the incident to her boss and the local leadership.

Meanwhile, No. F. 5226 Police Constable Edward Ezekiel Mwandile (PW2), who was then a traffic officer based at Lumbe Kaliua District in Tabora Region, received information from an informer that he had spotted two men who were suspected to be carrying government trophies. However, on stopping and arresting them, and as it turned out, PW2 and his colleagues found the said men in possession of six solar panels all wrapped up in two large polythene bags. Upon interrogation, one of them who is the third appellant herein, is said to have told PW2 and his fellow police officers at Lumbe who had increasingly become suspicious of the

solar panels that, they belonged to him and that he had obtained them from a certain Mussa who was a resident of Kambuzi Halt Village in Mlele District as payment in kind instead of paying him cash in respect of TZS 800,000.00 which he (Mussa) owed him. However, PW2 recounted how the increasing suspicion by the police officers at Lumbe led to the second and third appellants being bundled into a police car and whisked to the police station at Mpanda where they were later on joined and charged along with the first appellant.

For his part, the first appellant was suspected and arrested at his home Village of Kambuzi arguably on the same day of the deceased's murder following a rumour that he had hosted some unknown strangers on the eve of the murder incident. As it happened, the said strangers of whom people at Kambuzi had to be leery, were none other than the second and third appellants.

Back to the scene of the crime, the body of the late John Ntaja whose hands and legs were tied and wrapped up in a piece of cloth, was firstly spotted by the passersby early in the morning. After the report of the brutal murder was made available to the police, a team of police officers accompanied by a pathologist who performed the postmortem examination on the deceased went to the crime scene. The pathologist

opined that death had occurred about six hours before and that it occurred from asyphixia.

The appellants relied on the defence of alibi as would be expected. Whereas the first appellant told the trial court that on 26th January, 2015 he was at his home at Lusia hamlet in Kambuzi Halt Village and that he was arrested on 27th January, 2015 and not on 26th January, 2015 as alleged by the prosecution witnesses, the second appellant is on the record as having told the trial court that, at the time which is material to the occurence of the charged offence, he was home along Mshokola street in Kaliua township, Tabora Region. He recounted how he was arrested on 28th January, 2015 and taken to Kaliua Police station where he was severely beaten up and later on bundled into a train and whisked to Mpanda Police Station. Like the first appellant, he denied to have murdered the deceased or otherwise been privy to his murder.

The third appellant had a relatively similar story. He told the trial court that on 26th January, 2015 he was home at Nzugimlole village in Kaliua District doing general cleanliness. He remained there until 12.00 noon on 28th January, 2015 when he was arrested by two Police officers and taken to Ukumbi Singanga Police Post where he was detained in lock up. He was later on transferred to Kaliua Police Station and thereafter to

Mpanda Police Station before being joined with his co-appellants and formally charged in court. Upon the above explanation, he denied being involved in any way in the deceased's murder. In the same manner as his co-accused, he called no witness to support him.

The three gentlemen assessors who sat with the trial Judge returned a verdict of guilty. They were unanimously of the opinion that, although nobody saw the accused persons commit the offence with which they stood charged, they were seen together at Kambuzi Halt Village on the eve of the murder and that after the incident, the second and third accused disappeared and were later on arrested in the circumstances suggesting that indeed they had murdered the deceased in the course of stealing the six solar panels.

After evaluating the evidence before him, the learned trial Judge was satisfied and he accordingly found that the evidence adduced in support of the prosecution case was wholly circumstantial. Having briefly reviewed the law on circumstantial evidence, he went on accepting the prosecution evidence that the second and third accused were arrested at Lumbe immediately after the murder incident while in possession of six solar panels which were identified as having been stolen from Kambuzi Halt dispensary. Moreover, the learned trial Judge was satisfied that the

second and third appellants who were the residents of Kaliua District in Tabora Region had visited and stayed at the first appellant's home at Lusia in Kambuzi Halt village a day before the solar panels were stolen and that, the nightwatchman was callously murdered definitely to perpetrate the robbery. Without sufficiently explaining the meaning and import of circumstantial evidence and specifically stating whether or not he was invoking the doctrine of recent possession against the appellants, the learned trial Judge went on concluding thus:

> *"... I have found no any other alternative conclusion than inclining to the gentlemen assessors' opinion that the circumstantial evidence given by the prosecution witnesses is full of inculpatory facts which are incompartible with the innocence of the accused persons".*

Deeply aggrieved, the appellants through the legal services of Mr. Peter Kamyalile, learned advocate have come to this Court to challenge the decision of the trial court. Initially, the appellants had filed a memorandum of appeal raising ten grounds of complaint but, on being assigned the dock brief to represent them in terms of Rule 73(2) of the Tanzania Court of Appeal Rules, 2009 (hereinafter the Rules), Mr. Kamyalile prayed to argue the first, third and ninth grounds only. The learned counsel also successfully prayed in terms of Rule 81(1) of the

Rules to argue one additional ground of appeal which faults the decision of the trial court on account of the failure by the trial Judge to adequately sum up the case to the assessors by not directing them on the facts and vital points of law.

As intimated earlier, Mr. Kamyalile appeared for the appellant whereas Mr. John Mwesiga Kabengula learned Senior State Attorney appeared along with Ms. Irene Godwin Mwabeza learned State Attorney to resist the appeal on behalf of the respondent, the Director of Public Prosecutions.

Submitting in support of the additional ground of appeal and on behalf of the appellants, Mr. Kamyalile begun by referring us to section 298 (1) of the Criminal Procedure Act (Cap 20 R.E. 2022) (the CPA) which requires a trial judge, after closure of the case on both sides to sum up the evidence for the prosecution and defence to the assessors and then require each of them to give his or her opinion as to any specific question of fact addressed to him/her by the judge.

Highlighting what he viewed as the vital points which the learned trial Judge failed to adequately explain to the assessors who sat with him, Mr. Kamyalile submitted that, generally the summing up did not shed any light to the assessors on how the circumstantial evidence led by the

prosecution witness could be used in law. Elaborating, the learned counsel contended that, in his summing up, the trial Judge failed to direct the assessors on the meaning and implication of circumstantial evidence. Specifically, Mr. Kamyalile referred us to page 211 of the record of appeal where the trial Judge merely told the assessors that there were several kinds of evidence against the appellants without going further to identify to them the said kinds of evidence and their peculiar legal implications. In support of the ground that the trial Judge failed to properly sum up to the assessors both in accordance with section 298 (1) of the CPA and in line with our guidance through various case law, Mr. Kamyalile relied on our earlier decisions in the cases of **Fikiri Katunge v. Republic**, (Criminal Appeal No. 552 of 2016) [2020] TZCA 229 (14 May 2020, TANZLII), **Theophil Haule v. Republic**, (Criminal Appeal No. 315 of 2018) [2021] TZCA 167 (3 May 2021, TANZLII) and **Faraji Ally Likenge v. Republic**, (Criminal Appeal NO. 381 of 2016) [2020] TZCA 1854 (19 November 2020 TANZLII).

He also referred to the doctrine of recent possession which was not explained to the assessors but subsequently used by the trial judge in his judgment to support convictions of the second and third appellants. In view of the above-mentioned shortcomings in the summing up by the trial

Judge, the learned counsel entreated us to nullify the proceedings of the trial court, quash the appellants' conviction and set aside the death sentence meted out on them. Regarding the course forward, Mr. Kamyalile implored us to order for the appellants to be set free on the ground that, an order for retrial would give the prosecution the opportunity to go back and fill up the gaps in the prosecution case which, from the counsel's perspective, was materially wanting.

As stated earlier, in her submissions in reply, Ms. Mwabeza, who addressed the Court on behalf of the respondent was in total agreement with Mr. Kamyalile with regard to the failure by the trial judge to adequately sum up the case to the assessors. In faulting the trial Judge, the learned State Attorney, following in Mr. Kamyalile's footsteps submitted that, the trial Judge did not specifically direct the assessors that the case against the appellants was wholly based on circumstantial evidence. She also stated that, though the trial judge did not inform and explain to the assessors the meaning and implication of the doctrine of recent possession, he sort of raised it in the judgment and appeared to rely on it to justify the conviction of the second and third appellants. In addition to the cases cited to us by Mr. Kamyalile, Ms. Mwabeza referred us to our decision in the case of **Kashinje Julius v. Republic**, (Criminal

Appeal No. 305 of 2015) [2016] TZCA 222 (18 April 2016, TANZLII) regarding the necessary factors that have to be proved by the prosecution before the doctrine of recent possession can come into play.

The learned State Attorney gave another reason which in her view, vitiated the trial. She submitted that, after the assessors were duly selected, the trial Judge did not explain to them their role before they assumed their function. It was Ms. Mwabeza's view that, the omission by the trial Judge to explain to the assessors their duty and responsibilities rendered the proceedings a nullity as per our decision in the case of **Chesco Mveka v. Republic**, (Criminal Appeal No. 506 of 2020) [2022] TZCA 681 (7 November 2022, TANZLII). Thus and so, having set the legal position in its perspective, by parity of reasoning with Mr. Kamyalile, the learned State Attorney implored us to nullify the proceedings of the trial court, quash the appellants' convictions and set aside the death sentence imposed on them.

However, with regard to the way forward, Ms. Mwabeza was diametrically opposed to Mr. Kamyalile. She contended that, if it were not for the above-mentioned shortcomings in the involment of the assessors and the trial Judge's inadequate summing up to them, there was sufficient evidence to ground a conviction against the appellants. She thus prayed

that an order for retrial be made, giving us her word that, the prosecution will not go back to fill up the gaps and further that, above all, there were no gaps to be filled up in the prosecution case.

In rejoinder, Mr. Kyamilile supported Ms. Mwabeza's submission regarding the failure by the trial judge to explain to the assessors their role in the trial. He took the view that the omission had a negative impact on their participation in the trial.

We have reviewed the summing up of the trial Judge to the assessors. As it will be noted, after summarising the evidence from both sides, the learned trial Judge went on explaining at page 211 of the record of appeal thus:

> *"Gentlemen assessors, in law, there are many kinds of evidence like direct evidence, documentary evidence, hearsay evidence, visual identification evidence, evidence of relevant facts which sometimes is called circumstantial evidence, to mention but a few.*
>
> *In this case if you will find that the evidence adduced by the prosecution witnesses is circumstantial exclusively pointing to the guilty of the accused or otherwise, then you will advise me whether or not the accused are guilty of murder as charged".*

Then the trial Judge went ahead to ask each of the assessors to give him his opinion.

On our part, we have no hesitation at all in holding that indeed, for all purposes and intents, the summing up by the trial Judge in this case was materially wanting. As it appears from the above-quoted excerpt, the learned trial Judge was sort of confusing the assessors rather than guiding them on the facts and the law. This is borne out of the examples of the types of evidence he gave to the assessors which were redundant and extraneous in view of what was at issue in this case. The confusion to the assessors must have been compounded when the trial Judge asked them to determine whether the evidence given by the prosecution witnesses was circumstantial and if it exclusively pointed to the guilt of the appellants. That was notwithstanding the fact that he had not sufficiently explained to the assessors the meaning of circumstantial evidence and how, in the circumstances of this case, it could ground a conviction of the appellants. The trial judge did not mention and explain to the assessors the meaning of the doctrine of recent possession; yet he raised it in the judgment to draw an inference of guilty against the second and third appellants.

In our view, in terms of section 298(1) of the CPA together with our various decisions on the same subject matter, in summing up, the judge is required to carefully direct the assessors in simple language, on the vital points of law and the evidence relevant to the matters placed before the court during the trial. One clear example on which the assessors have to be guided is where as in the present case, the case for the prosecution depends exclusively upon circumstantial evidence, where the court is enjoined, before deciding on a conviction, to find that the inculpatory facts which must be proved beyond reasonable doubt, are incompatible with the innocence of the accused and incapable of explanation upon any other hypothesis than that of guilty.

While there is no gainsaying that there are no templates showing the form in which the summing up should be made to the assessors, it must be a detailed analysis of the facts and the law based on the peculiarity of the evidence led in the particular case. Looking at the summing up as a whole in the instant case, we have no hesitation to hold that the trial Judge fell below the well-established standard of directing the assessors to the facts and vital points of law arising out of this dispute.

But then, as rightly submitted by Ms. Mwabeza and supported by Mr. Kamyalile, the problems begun right from the inception when the trial

Judge inadvertently omitted to explain to the assessors their role and duties in the trial. We entirely agree with the learned State Attorney that, on the strength of our decision in the case of **Hilder Innocent v. Republic**, (Criminal Appeal No. 181 of 2017) [2018] TZCA 185 (6 September 2018, TANZLII) which we followed in **Chesco Mveka** (supra), failure to inform the assessors of their role and responsibility in the trial diminishes their level of participation and renders their participation in the trial meaningless.

By extension, failure by the trial Judge in this case to inform the assessors of their duty and responsibilities in the trial threw them in a passive position as to leave the trial judge conducting the trial without their aid. That was non-compliance with sections 265 (as it was before the amendment by the Written Laws (Miscellaneous Amendments) Act No. 1 of 2022) and 298 (1) of the CPA. The end result of all this was to vitiate the trial and the resulting convictions and sentences.

All said and done, without considering the remaining grounds of appeal, we allow the appeal in respect of the additional ground which was mounted by Mr. Kamyalile. Consequently, we nullify the proceedings before the trial court, quash the appellants' convictions and set aside the death sentences meted out on them.

On the other hand, we have seriously considered the contending submissions by counsel for the parties on the way forward. Having regard to the facts and circumstances of this case, the balance and interest of justice appear to tilt in favour of the decision that an order for retrial be made. We accordingly order for the appellants to be tried ***de novo*** which needless to say, must be expedited and in accordance with the current set up of the law with regard to the involvement of the assessors as prescribed under section 265 (1) of the CPA. Meanwhile the appellants shall remain in custody awaiting retrial.

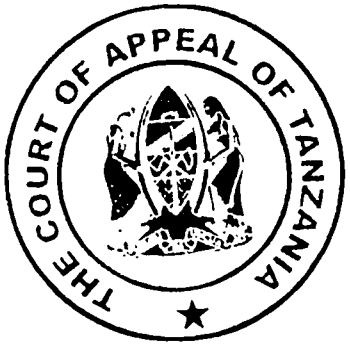
**DATED** at **SUMBAWANGA** this 5th day of October, 2023.

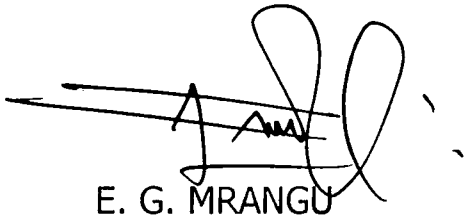
F. L. K. WAMBALI
**JUSTICE OF APPEAL**

P. M. KENTE
**JUSTICE OF APPEAL**

Z. G. MURUKE
**JUSTICE OF APPEAL**

The Judgment delivered this 5th day of October, 2023 in the presence of the Appellants in person and Ms. Marietha Augustine Maguta, learned State Attorney for the Respondent is hereby certified as a true copy of the original.



E. G. MRANGU
**SENIOR DEPUTY REGISTRAR**
**COURT OF APPEAL**