IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

(CORAM: MWAMBEGELE, J.A., KOROSSO, J.A., And RUMANYIKA, J.A.)

CRIMINAL APPEAL NO. 316 OF 2019

ELIAS MWAITABILA ..... 1ST APPELLANT

BARAKA DANIEL ..... 2ND APPELLANT

EDSON MBUKWA ..... 3RD APPELLANT

LEONARD MKISI @MZAMBIA @ MZEDI ..... 4TH APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Ngwala, J.)

dated the 18th day of May 2017

in

Criminal Sessions Case No. 6 of 2017

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JUDGMENT OF THE COURT

28th September, 2022 & 08th March, 2023

KOROSSO, J.A.:

In the High Court of Tanzania sitting at Mbeya, Elias Mwaitabila, Baraka Daniel, Edson Mbukwa and Leonard Mkisi @ Mzambia @ Mzedi, the appellants herein, stood charged with the offence of murder contrary to section 196 of the Penal Code [Cap. 16 R.E. 2002, now R.E. 2022] (the Penal Code). In the respective charge, it was alleged that the appellants on 18/01/2008 at Black Market area Tunduma in Mbozi District, within

Mbeya Region, jointly and together murdered two persons, namely, Justin Simkoko and Kephas Sichalwe. Each of the appellants denied the charges.

Briefly, the factual background of the matter that gave rise to the appeal before us was presented by seven prosecution witnesses. In addition, ten exhibits were also tendered and admitted into evidence. According to Vumilia Pidgo Sichalwe (PW1), a trader who operated her trading business in a kiosk at the Black-Market area in Tunduma, on 18/01/2008 on or about 20.45 hours while at her business premise, heard bullet shots which led her to hide behind the kiosk. While at her hiding place, she saw six people outside the kiosk and then watched as one of them who was holding a gun shoot down Kephas Sichalwe and Justin Simkoko (both deceased). PW1 claimed to have recognized the 1st appellant as one of the culprits. He testified that he managed to recognize him because of one, the three electric lights from the surrounding business premises illuminating the area, and two, since she knew him prior to the incident. Mashauri Pidgo Sichalwe (PW2) alluded that on that fateful night, at the Black Market area in Tunduma, on or about 18.45 hours, he was on the verge of closing for the day his saloon known as '*Nilijua Mtasema*', then saw his brother, the late Kephas Sichalwe and his friend one Justin arrive at the saloon on a motorcycle. The late Kephas

entered the saloon while the late Justin was left outside sitting on the motorcycle. While inside the saloon talking with Kephas, he heard a gunshot fired outside the saloon. After a few minutes, some people approached the saloon area and he heard from outside Justin being queried on why he, a policeman was in the area following them around, stating; "*wewe ni askari police, kwa nini umeamua kutufuata mpaka huku?*" Soon after, Justin was shot with a gun and went down. It was then that Kephas rushed outside to see what was happening but before he could do anything another bullet was fired at him and he fell down. PW2, on seeing what was going on managed to hide. He alleged that while at his hiding place, he was able to see and identify Elias, the 1st appellant, as one of the bandits. His reasons for recognizing him included the fact that he knew him prior to the incident as a friend of his brother who sold "*harshish/cannabis sativa*". In addition, the light illuminating the area from two other electric lights from nearby kiosks and the motorcycle light also facilitated his view. PW2 further stated that he saw the bandits had two guns and that after they left, he reported the incident to a police officer named Bruno.

Upon arrival at the crime scene, the police officers initiated an investigation of the incident. The sketch map tendered and admitted as

exhibit P2 was drawn by E. 7486 D/C Gibson (PW4). Aden Kajela (PW5), then the Asst Insp of Police, recorded the cautioned statement of the 1st appellant which was admitted as exhibit P4. PW4 also took part in the search for the culprits and their arrests. He averred that the 1st, 2nd and 4th appellants had confessed through their cautioned statements. The cautioned statement of the 2nd appellant was recorded by Sgt. Bathseba (PW6) and admitted as exhibit P8. According to Charles Makungi (PW7), investigations of the murder incident led to the arrest of the 1st appellant. The 1st appellant also enabled them to arrest the 3rd appellant popularly referred to as "*babu*". At the 3rd appellant's house weapons that were allegedly used in the commission of the offence were seized; namely, a short gun pump with three bullets which were admitted as exhibit P6 collectively. PW7 further testified that the 1st appellant also led them to the houses of other suspects alleged to have been involved in the incident including the 2nd and 4th appellants. At the house of the 2nd appellant, a toy pistol admitted as exhibit P7 was seized. The cautioned statements of the 3rd and 4th appellants were recorded by PW7.

On the part of the defence, it is only the appellants themselves who testified on oath and each categorically denied involvement in the offence charged. The 1st appellant's testimony recounted the circumstances of his

arrest on 20/01/2008 at Vwawa bus stand. The 2nd appellant narrated his arrest on 21/01/2008 at Mlowo bus stand and denied being found in possession of the toy pistol. For the 3rd appellant, his testimony focused on his arrest on the 21st of the month and year he could not remember. He disputed having been found with a gun and bullets at his home. Regarding the 4th appellant, he testified that he was arrested on 28/01/2008 at Mbalizi area in Mbeya District on allegations of being in possession of stolen properties from Tunduma.

The trial court having heard the evidence from both sides, believed the prosecution case and decided to disregard the case for the defence and held that the charge of murder has been proved beyond reasonable doubt against the four appellants. The four appellants were thus convicted and sentenced to the mandatory sentence of death by hanging in terms of section 322 of the Criminal Procedure Act [Cap 20 R.E. 2002, now, R.E. 2022] (the CPA).

All the appellants were dissatisfied with the decision of the High Court and each of them filed a separate memorandum of appeal which culminated into 18 grounds of appeal in total. On 20/9/2022, a joint memorandum of appeal with three grounds of appeal was filed by the appellants' learned advocate. For reasons which will become known

hereinafter, we shall only reproduce the grounds found in the joint memorandum of appeal, which are:

1. The honourable trial Judge failed to adequately sum up to the assessors according to the law.
2. The honourable trial Judge failed to measure the application of visual identification made at night and during horrifying conditions.
3. The alleged cautioned confession of co-accused left much to form the basis of conviction of each appellant.

At the hearing, all four appellants were present in person and represented by Mr. Justinian Mushokorwa, learned Advocate. Ms. Prosista Paul and Mr. Joseph Mwakasege, both learned State Attorneys represented the respondent Republic.

On taking the floor to argue the appeal, Mr. Mushokorwa commenced by seeking leave of the Court to abandon all the grounds filed by the appellants in separate memoranda and thus remain with the grounds filed in the joint memorandum of appeal which essentially condensed the grounds of appeal filed by the appellants in separate memoranda. The learned counsel assured the Court that this prayer is one supported by all the appellants. Upon being granted leave to proceed, he then prayed and was granted leave to abandon the 2nd and 3rd grounds of appeal in the

joint memorandum of appeal and only address the Court on the 1st ground of appeal.

Amplifying on the remaining ground of appeal, Mr. Mushokorwa faulted the trial judge for failing to explain to the assessors the vital points of law relevant to the offence charged in contravention of section 198 of CPA. His argument was that the said provision requires the trial court, during summing up to the assessors to expound on essential points of law such as the ingredients of the offence of murder, the rights of the accused, the import of a retracted confession and the burden of proof. Issues which the learned trial judge was expected to inform the assessors before he invited them to give their verdict on the innocence or guilt of each of the appellants. The learned counsel argued that in the present case where the summing up to assessors can be found from pages 195 to 200 of the record of appeal, the trial judge only summarized the evidence adduced in court without providing any explanation on the legal issues or laws applicable. According to Mr. Mushokorwa, the omission was plainly an abrogation of and failure to exhaust the duties of the trial court, which was a fatal error as pronounced in various decisions of the Court.

With respect to the consequential effect of such an omission, the learned counsel referred us to the decision of **Omary Khalfan Khalfan**

v. Republic, Criminal Appeal No. 107 of 2015 (unreported) where it was held that such an omission is fatal and incurable, and the remedy is to nullify proceedings. He thus urged us to also find the omission in the instant case to be incurably fatal and lead us to nullify the proceedings. He further contended that in the obtaining circumstances with the very weak prosecution evidence and having failed to prove the case against the appellants to the standard required, whilst ordinarily a retrial should have been ordered, this should not be the case here. He maintained that in the obtaining scenario, justice demands that upon nullification of proceedings, quashing of the proceedings, and judgment, together with setting aside the meted sentences, the appellants be set free. He pointed out that the evidence relied upon by the trial court to convict the appellants, that of visual identification of the appellants by PW1 and PW2 was not to the standard set by various decisions of this Court and did not remove the possibility of mistaken identity.

According to Mr. Mushokorwa, the established conditions to remove such doubts when the prosecution relies on visual identification were not met fully particularly, when the horrifying circumstances obtained at the time of the incident are considered. He asserted that with the weakness of the evidence on the identification of the appellants which cannot be

relied upon to establish proper identification of the 1st appellant the only evidence which remains is that of the cautioned statements of the appellants. He argued that the cautioned statements' admissibility is engrained with procedural errors which should lead them to be expunged. For the 2nd to 4th appellants, he argued that the only available evidence is the uncorroborated evidence of the co-accuseds found in the cautioned statement and thus cannot stand. Mr. Mushokorwa concluded by urging the Court to take into consideration the fact that the appellants have been in custody for 15 years and thus the interest of justice directs that with the weakness of the prosecution case, the appellants be set at liberty.

On the contending side, Mr. Mwakasege who took lead in submitting for the respondent Republic began by conceding to the ground of appeal and agreeing with the learned counsel for the appellant that the trial judge erred by failing to properly direct the assessors on vital points of law relevant for the instant case. On the way forward, the learned State Attorney who had at the beginning urged the Court to order a retrial against the 1st appellant only, he however, upon further reflection agreed with the learned counsel for the appellant that the evidence against all the appellants was lacking to incriminate any of them for the offence charged. Mr. Mwakasege contended that, considering the obtaining

circumstances, after the nullification of the proceedings, quashing of conviction and judgment, and setting aside of the sentences, all the appellants should be set free since in the instance case, a retrial is not what justice demands.

In rejoinder, in view of Mr. Mwakasege's concession, Mr. Mushokorwa had nothing to add to his submission in chief.

On our part, having carefully considered the remaining ground of appeal before us, the cited authorities, and the oral submissions from the contending sides, certainly, the learned counsel for the appellant and the learned State Attorney agree that the trial Judge's summing up to assessors was insufficient for the absence of proper direction to the assessors on vital points of law relevant to the charges against the appellants. Undoubtedly, at the time of the conduct of the trial subject of the current appeal, section 265 of the CPA directed that such trials before the High Court be conducted with the aid of at least two assessors. That said, we are alive to the amendments to section 265 of the CPA ushered in vide Written Laws (Miscellaneous Amendments) Act No. 1 of 2022, whereby now it is no longer mandatory to conduct a criminal trial with the aid of assessors. Moreover, we are alive to the fact that at the time the appellants' trial was conducted, the position was as stated herein above.

Suffice it to say that, section 265 was couched in mandatory terms and this was observed by the Court in the case of **Kulwa Misangu v. Republic,** Criminal Appeal No. 171 of 2015 (unreported).

It is common knowledge that under section 298(1) of the CPA when the case for 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 or her opinion. Indeed, it has been construed in various decisions of this Court including the case of **Omary Khalfan** (supra) that "*a trial with the aid of assessors*" under section 265 of the CPA is the one that requires the trial High Court Judge to; "*give the assessors adequate opportunities to put across questions and after the close of the evidence for the prosecution and defence,* ***to sum up and to obtain the opinion of assessors.***" (Emphasis added].

See also, **Selina Yambi and Two Others v. Republic**, Criminal Appeal No. 94 of 2013 and **Charles Lyatii @ Sadala v. Republic**, Criminal Appeal No. 290 of 2011 (both unreported).

Regarding the phrase, "*the judge may sum up*", the Court in **Omary Khalfan** (supra) having considered various decisions of the Court interpreted the phrase to; "*imply a mandatory duty placed on the shoulders of the trial Judge to sum up.*"

In addition, in **Mulokozi Anatory v. Republic**, Criminal Appeal No. 124 of 2014 (unreported), the Court stated:

> *"...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 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 aid of assessors, trial judges sitting with assessors have invariably been summing up the cases to the assessors."*

It is thus well settled that, at the summing up stage, the trial Judge has the mandatory responsibility to expound to the assessors all salient points of law relevant to the case pertaining to the facts of the case. In the case of **Washington Odindo v. Republic** (1954) 21 EACA 392, the erstwhile Court of Appeal of Eastern Africa 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 Bituro v. Republic** [1982] T.L.R. 264 and **Mashaka Athumani Makamba v. Republic**, Criminal Appeal No. 107 of 2020 (unreported).

For the foregoing, the issue for determination is thus whether the trial Judge did properly and sufficiently sum up to the assessors on essential points of law requisite in the determination of the offence charged.

Having gone through the summing up notes to assessors found in the record of appeal on pages 195 to 200, it shows that although in the judgment, the trial Judge considered various issues in the process of determination of the case such as; the burden of proof, factors for consideration in evidence of visual identification of the 1st appellant, value of the admitted retracted cautioned statements of the appellants, import of accomplice or co-accused evidence, import of being the doctrine of recent possession, requirements of corroboration of evidence and the defence of *alibi,* this is not reflected in the summing up notes to assessors. Clearly, the assessors were not directed on the same. In the summing-up notes, the trial High Court Judge only summarized the evidence adduced by the prosecution and defence witnesses and did not explain to the assessors any of the salient legal points pertinent to the case to guide

them during the process of giving their verdict on the guilt or innocence of the appellants.

In essence, the trial Judge failed to assist the assessors to understand the facts of the case and how they related to the applicable law, an essential requirement in such trials, as expounded in the decisions of this Court in the case of **Washington Odindo** (supra), **Augustino v. Republic**, Criminal Appeal No. 70 of 2010 and **Masolwa Samwel v. Republic,** Criminal Appeal No. 206 of 2014 (Both unreported) as stated herein.

Furthermore, as correctly asserted by the learned counsel for the contending sides, the trial judge did not address the assessors on the import of confessional statements, factors to prove an accused was identified or recognized removing the possibility of mistaken identity, the ingredients of the offence charged, evidence requiring corroboration, where the burden of proof lies and what the defence of *alibi* entails. The defence that the appellants fronted before the trial court. This was a fatal anomaly, especially considering as stated hereinabove, the same were considered by the trial Judge in the determination of the appellants' guilt. Indeed, where the trial court has failed to ensure proper involvement of

the assessors in a given trial, as was what transpired in the trial subject to the instant appeal, such anomaly vitiates the trial.

The above being the case, we are of the firm view that, the omission is fatal and incurable under section 288 of the CPA since in the premise, it cannot be said that the trial was conducted with the aid of assessors in compliance with the then section 265 of the CPA. We thus nullify the proceedings of the High Court, quash the proceedings and judgment and set aside the sentences imposed upon the appellants.

On the way forward, both learned counsel for the parties herein are agreed that besides the fatally flawed procedure in the conduct of the trial, the evidence for the prosecution was weak and the Court should not order a retrial, but set the appellants at liberty. In this feat, we are guided by the decision of the defunct Court of Appeal for Eastern Africa in **Fatehali Manji v. Republic** [1966] E.A. 343 where it was held:

> *"In general, a retrial may be ordered only where the original trial was illegal or defective; I will not be ordered where the conviction is set aside because of insufficiency of evidence or for purpose of enabling the prosecution to fill in gaps in its evidence at the first trial... each case must depend on its own facts and order for retrial should only be made where the interests of justice require it."*

Essentially, the issue before us now is whether in the present appeal justice demands that a retrial should be ordered. The case for the Prosecution relied on evidence of PW1 and PW2 to prove the identification of the 1st appellant. Both witnesses alleged that they knew him prior to the incident. The fact that generally visual identification evidence is the most unreliable evidence has been reiterated in various decisions of the Court, such as **Waziri Amani v. Republic** [1980] T.L. R. 250, **Issa Mgara @ Shuka v. Republic**, Criminal Appeal No. 35 of 2005 (unreported), **Masolwa Samwel** (supra) **and Chacha Nyamhanga @ Samwel and Another** (supra). Specifically, in **Issa Mgara @ Shuka** (supra), the Court observed that it is not sufficient for the witnesses to make bare assertions that *'there was light.'* The Court held that:

> "*It is our settled minds; we believe that it is not sufficient to make bare assertions that there was light at the scene of the crime. It is common knowledge that lamps be they electric bulbs, fluorescent tubes, hurricane lamps, wick lamps, lanterns, etc. give out light with varying intensities. Definitely, light from a wick lamp cannot be compared with light from a pressure lamp or fluorescent tube. Hence the overriding need to give in sufficient details on the intensity of the light and size of the area illuminated.*"

In the case at hand, as rightly argued by learned counsel for the appellants and conceded by the learned State Attorney, the prosecution evidence related to sufficiency of light in terms of brightness and intensity, the proximity of the witnesses who testified on this (PW1 and PW2) with the culprits at the crime scene and the duration of the incident does not augur with the standard set to remove doubts on the possibility of mistaken identity. The evidence is that at the time of the occurrence of the incident, PW1 was hiding behind the kiosk and PW2 was inside the kiosk. Undoubtedly, under such circumstances, PW1 and PW2's visualization of what transpired at the crime scene including the shooting of the deceased person was limited, let alone identifying the culprits.

We are thus of the firm view that had the High Court Judge carefully considered the evidence considering the settled factors to prove the sufficiency of the evidence on identification, she would not have reached the conclusion that the appellants were properly identified since there are a lot of doubts in the prosecution evidence in terms of the identification of culprits. Doubts which should invariably benefit the appellants. In the instant appeal, proof of identification of the culprits at the scene of the crime was essential and critical to prove the offence as against the appellants.

In the upshot, we thus are of the view that in the instant case, ordering a retrial will not be what justice demands considering what we have stated above. We, therefore, order the immediate release of the appellants from prison unless they are detained for some other lawful cause.

DATED at **DAR ES SALAAM** this 7th day of March, 2023.

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

S. M. RUMANYIKA
JUSTICE OF APPEAL

The Judgment delivered this 8th day of March, 2023 in the presence of appellants in person via video link from Ruanda Prison, and Mr. Stephen Rusibamaila, learned State Attorney for Respondent/Republic, is hereby certified as true copy of the original.

R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL