IN THE COURT OF APPEAL OF TANZANIA
AT DODOMA

CRIMINAL APPEAL NO. 165 OF 2017

(CORAM: MUSSA, J.A., MWARIJA, J.A., And MZIRAY, J.A.)

HAMIS BASIL ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Decision of the High Court of Tanzania at Dodoma)

(Mohamed, J.)

Dated of 4th day of May, 2017
in
Criminal Session No. 83 of 2012

.....

JUDGMENT OF THE COURT

17th & 20th July, 2018

MUSSA, J.A.:

In the High Court of Tanzania, at the Dodoma Registry, the appellant was arraigned for murder, contrary to sections 196 and 197 of the Penal Code, Chapter 16 of the Revised Edition of 2002 (the Penal Code). The particulars were that, on or about the 24th day of August 2010, at Babayu Village, within Bahi District, in Dodoma Region, the appellant murdered a

certain Esther Venance, whom we shall hereinafter refer to as "the deceased".

The appellant refuted the accusation, whereupon the prosecution featured five witnesses, a report on post-mortem examination (exhibit P1) as well as two complete arrows and an arrow head which were collectively admitted as exhibit P2. On his part, the appellant gave sworn testimony and did not call any witness. On the whole of the evidence, the High Court (Kwariko, J., as she then was,) found the prosecution to have established its case to the hilt and, accordingly, the appellant was found guilty, convicted and handed down the mandatory death sentence. He is presently aggrieved upon three points of grievance, namely:-

> *"1. That, the Honorable trial Judge erred in law and in facts in not holding that Appellant's ability to form malice aforethought was vitiated by drunkardness as shown in the evidence on record.*
>
> *2. That, the Honourale trial Judge erred in law during the summing up, in failing to make a detailed summary to the Lady Assessors of the evidence on record touching*

the defence of provocation raised as well as the fact that the Appellant was drunk on the fateful night and failed to relate them to their legal positions; which vacuum led to the assessors' failure to give their opinions or clear opinions regarding the issues of provocation and the effect of drunkardness on the fateful night.

3. *That, the Honorable trial Judge erred in law and in facts in not holding that there was no evidence to show that the arrow shot by the Appellant is the one which caused the death given the evidence on record."*

Ahead of our consideration of the issues of contention in this appeal, we think it is necessary to unveil the factual background, albeit, very briefly:-

The appellant and Margareth Zebedayo (PW1) who are peasant residents of Babayu Village were, respectively, husband and wife. Despite the fact that the couple was blessed with four issues, theirs was a quarrelsome marriage. Their misunderstandings were prompted by the appellant's belief that PW1 was cheating on him with a certain Muluta Hussein. The high-water mark of the conflict was reached some day in

August, 2010 when the appellant thoroughly assaulted PW1 to the extent of forcing her to spend her night at a nearby ravine. The following day, she retreated to her father's home at Mayamaya Village.

On the 23rd August, 2010 PW1 and her father took a letter from the Mayamaya Sub-village Chairman which was destined for the Babayu Sub-Village Chairman (PW2). As it were, in the letter, the former was asking the latter to reconcile the appellant and his wife. Upon receiving the letter, PW2 could not immediately embark on the reconcillian exercise since, as he observed, the appellant was at a local brew shop at that material time. And, so he arranged sleeping places for both PW1 and her father so that the reconciliation was to take place on the following day. More particularly, PW1 was located to the house of a certain Asnath Chedego who is PW2's aunt.

A good deal later, in the wee small hours of around 3:00 a.m. or so, the appellant knocked at PW2's house and immediately enquired about the whereabouts of his wife to which PW2 told him that his wife was at his aunt's home. The appellant who was armed with a bow and three arrows, then drew closer and, again, repeatedly enquired about the whereabouts

of his wife, to which PW2, again, insisted that, she was not there. As to what transpired next, I will let the record of PW2's testimony to read for itself:-

> *"Upon that answer, the accused shot my wife with an arrow in the left side of the abdomen. I do not know why the accused shot the deceased. The deceased said Hamis has killed her: HAMIS umeniua."*

Soon after, the appellant clicked his heels and started to run clear of the scene but PW2 followed him in pursuit and, within a while, he closed up and securely apprehended him. More particularly, the appellant was apprehended just 30 paces from PW2's residence.

A little later, a police detective corporal No.D9712 Emmanueal, visited the scene in the company of a medical officer. By then the deceased had already died. Upon an autopsy examination, her death was attributed to a poisonous arrow and hypovolaemia.

In reply to the foregoing condemnation, the appellant did not quite refute there being a misunderstanding with his wife on the 19th August, 2010. He actually slapped her and left home to avoid further

confrontation. Upon his return, PW1 was not home but he did nothing as he had to go to the bush to process timber because he was a charcoal dealer. He stayed in the bush for three days but, upon his return on the fateful day, PW1 was still not home. The rumour which the appellant got wind, had it that PW1 was staying at PW2's residence.

Next, the appellant visited a pombe shop where he consumed two litres of liquor and thereafter returned home to pick a bow and three arrows, as he put it, for security reasons. Then, around 8:00 p.m. or so, the appellant headed towards the residence of PW2, ostensibly, to look for his wife. Upon reaching there the appellant saw PW1, PW2 and the deceased seated together outside the house. PW2 then retorted at him in the following words:-

> *"You, have you started your stuborness."*

Soon after, PW1 was on her heels and then, in his own words, the appellant told the trial court:-

> *"I threatened my wife with an arrow as I was a bit at a distance from where she was..... I let the arrow off to threaten PW1. The three were outside the door. I do not know where the arrow lodged."*

Thus, with the foregoing version, the appellant refuted the prosecution accusation to the effect that he intentionally killed the deceased.

Having heard the respective cases from either side, the learned trial Judge summed up the case to the three lady assessors who had sat with her. In their respective opinions, two assessors unanimously returned a guilty verdict, whereas the remaining lady assessor was of the view that the appellant was not guilty. As we have already intimated, in the upshot, the learned trial Judge was impressed by the version told by the prosecution witnesses and, accordingly, the appellant was found guilty, convicted and sentenced to the extent as we have already indicated.

When the appeal was placed before us for hearing, the appellant was represented by Mr. Paul Nyangarika, learned Advocate, whereas the respondent Republic had the services of Mr. Morice Sarara, learned State Attorney. As it were, Mr. Nyangarika fully adopted the three grounded memorandum of appeal but, in the course of hearing, it was palpably clear that the appeal turns on ground No. 2 which complains that the learned Judge non-directed the lady assessors on vital points of law.

To us, it is, however, noteworthy that the learned Judge quite elaborately and sufficiently directed the lady assessors on the tenents and availability of the defence of provocation and, thus, the appellant's complaint in this regard cannot hold water. But, certainly, on account of the available evidence to the effect that the appellant had been drinking alcohol immediately before the assault on the deceased, the learned Judge ought to have directed the assessor on the law relating to drunkenness and, more particularly, the provisions of section 14 (4) which stipulates:-

> *"Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence."*

As to what are the consequences of the no-direction of the assessors on such a vital point of law, we propose to start by paying homage to the old case of **Washington Odindo vs. The Republic** [1954] 12 EACA 392 where the defunct Court of Appeal for Eastern Africa had this to say:-

> *"The opinion of assessors can be of great value and assistance to 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 assessors opinion is correspondingly reduced."

Upon numerous decisions, this Court has insistently emphasized the need for a trial Court to direct the assessors on vital points of law. A non-compliance has been held to be fatal with the result of vitiating the entire trial proceeding. In, for instance, the unreported Criminal Appeal No. 290 of 2011 – **Charles Lyatii @ Sadala vs. The Republic,** the Court vitiated the High Court proceedings on account of the assessors not being directed on what malice aforethought was all about. The Court had cited the ratio decidendi in the English case of **Bharat vs. The Queen** (1959) AC 533 and observed:-

*"Since we accepted the principle in **Bharat's** case as being sensible and correct, it must follow that in a Criminal trial in the High Court where assessors are misdirected on a vital point, such trial cannot be construed to be a trial with the aid of assessors. The*

position would be the same where there is a non-direction to the assessors on vital point."

Corresponding remarks had earlier been made in the case of **Tulubuzya Bituro vs. The Republic** [1982] T.L.R. 264. Thus, in the matter under our consideration, the failure by the learned trial Judge to address the assessors on the law relating to drunkenness was fatal with the effect of nullifying the entire trial proceedings. Both Mr. Sarara and Mr. Nyangarika urged us to nullify the proceedings of the High Court but, whereas the learned State Attorney pressed for a new trial, Mr. Nyangarika submitted that a re-trial would be improper on account of the fact that the case for the prosecution fell short of proof. Having carefully weighed the learned rival submissions in the light of the factual settings of the case, we think it will be in the best interests of justice to nullify the proceedings and order a retrial.

As the non-compliance was raised in one of the grounds of appeal, we, accordingly, partly allow the appeal and nullify the entire proceedings of the High Court. The resultant conviction and sentence are, respectively, quashed and set aside. It is further ordered that the appellant should be tried afresh as expediously as possible before another Judge and a

different set of assessors. In the meantime, the appellant should remain in custody as he awaits the resumption of the trial.

Order accordingly.

DATED at **DODOMA** this 19th day of July, 2018.

K. M. MUSSA
JUSTICE OF APPEAL

A. G. MWARIJA
JUSTICE OF APPEAL

R. E. S. MZIRAY
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

S.J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL