IN THE COURT OF APPEAL OF TANZANIA
AT MBEYA

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

CRIMINAL APPEAL NO. 524 OF 2019

HOSEA JOHAN MWAISWELO.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Ngwala, J.)

Dated the 26th day of July, 2019

in

Criminal Sessions Case No. 29 of 2014

.....

JUDGMENT OF THE COURT

30th November & 7th December, 2022

WAMBALI, J.A.:

The appellant, Hosea Johan Mwaiswelo appeared before the High Court of Tanzania at Mbeya (the trial court) upon information for murder of Daina Kihaba. It was plainly alleged in the information placed before the trial court that, the appellant committed the offence of murder contrary to section 196 of the Penal Code, on 19th January, 2014 at Syakula area within Rungwe District in Mbeya Region. The allegation was strenuously denied by the appellant.

The prosecution case was supported by six witnesses; namely, Aines Erasto Mwangoka (PW1), Esther Fred Mwakalasa (PW2), Joshua Mwakalibule (PW3), Hakimu James Mwakipesile (PW4), EX. Police D. 4534 D/Station Sergeant Muhibu Mwaigoga (PW5) and No. D. 7929 D/Sergeant

Aggrey Amos Mwambingu (PW6). It is noteworthy that no exhibit was tendered during the trial by the prosecution.

Essentially, the substance of the prosecution evidence was that on the fateful date, the appellant assaulted the deceased with an iron bar and a bush knife. It was the testimonies of PW1 and PW2; the grand daughters of the deceased, that before the incident, the appellant was well known to them and thus, they recognized him at the scene of crime with the assistance of the electric light at the sitting room because the piece of cloth he had covered his face fell down. The duo also testified that on the material date, the appellant had worn a black cap, black coat and black t-shirt. According to the said two witnesses, after the appellant had assaulted the deceased, he also hit PW1 on the cheek to stop her from raising the alarm to seek assistance from neighbours during the assault of the deceased. It is further on record that the recognition of the appellant at the scene of crime was disclosed by PW1 and PW2 to PW3 and PW4 who were among those that responded to the alarm. PW5 is on record to have rescued the appellant from the people who were assaulting him after being arrested.

Though the postmortem report was not tendered at the trial, it was the testimony of PW6 that he witnessed the examination of the body of the deceased by Dr. Sanga at Tukuyu District Hospital in the presence of relatives.

In his defence, the appellant denied to have known the deceased who was invaded by robbers. He alleged that on 19th January, 2014 while asleep at his home, a group of people awakened him on allegation that he was among the robbers who invaded the house of the deceased. Despite his denial, they dragged him to the scene of crime where he was beaten up until he became unconscious and when he became conscious, he found himself admitted in hospital. After he was discharged, he was taken to the police station for interrogation but he refused to admit commission of the offence. As a result, police officers held his right thumb forcefully and ordered him to sign the document which he did not know the author. He totally denied to have recorded the cautioned statement before PW5.

At the height of the trial, the trial judge evaluated the evidence for both sides and in the end, she concurred with the opinion of assessors who assisted her that, the appellant was guilty of the offence charged. She thus convicted him and in terms of section 197 of the Penal Code, she imposed the mandatory sentence of death by hanging.

The finding and conviction of the appellant by the trial court is contested through the instant appeal. Initially, the appellant lodged a memorandum of appeal comprising of six grounds of appeal. However, upon being instructed to represent the appellant, Mr. Simon J. M. Mwakolo, learned advocate, agreed with him and lodged a supplementary

memorandum of appeal in substitution of the former in terms of rule 73 (2) of the Tanzania Court of Appeal Rules, 2009. The ground states that:

> *"That the Honorable learned judge erred both in points of law and facts when she failed to address the assessors on the vital points of law regarding to issues of who killed the deceased, identity of the accused, proof of the offence of murder and lack of postmortem Examination report in her summing up to assessors".*

At the hearing of the appeal, as Mr. Mwakolo was indisposed, Mr. Baraka Mbwilo, learned advocate held his brief with leave to proceed on behalf of the appellant. The respondent Republic was duly represented by Messers Hannarose Kasambala and Xaveria Makombe, both learned State Attorneys.

In the first place, submitting in support of the sole ground of appeal, Mr. Mbwilo argued that though the trial judge was assisted by assessors during the trial, according to the record of appeal, she did not inform them regarding their responsibility before the trial commenced as required by law. In his opinion, the omission diminished the participation of the assessors on the contention that they were not made aware of what they were required to do at the trial in assisting the trial judge.

Secondly, the learned advocate submitted that the summing up to assessors by the trial judge was not adequate as required by the law. He

stated that upon perusal of the trial judge's summing up notes on record, it is clear that she did not inform and explain to the assessors the salient vital points of the law in the case. These include; malice afore thought and its importance in proving the case of murder, identification of the appellant at the scene of crime, cautioned statement of the appellant and its value, defence of alibi and the existence or non-existence of the postmortem report on the cause of death of the deceased.

In the circumstances, Mr. Mbwilo submitted that, failure of the trial judge to inform assessors of their responsibility and to sum up properly, rendered the proceedings to have not been conducted with the aid of assessors as required by section 265 of the Criminal Procedure Act (the CPA) as it was before the amendment effected by the Written Law (Miscellaneous Amendment) Act, No. 1 of 2022. In the result, he argued, the proceedings were rendered a nullity. He thus prayed that the entire trial court's proceedings be nullified; conviction quashed and sentence set aside. As to the way forward, Mr. Mbwilo submitted that having critically examined the evidence on record, the justice of the case requires that a retrial be ordered. He therefore urged the Court to order a retrial before another judge and a separate set of assessors as the trial judge has retired from service.

In response, Ms. Makombe supported Mr. Mbwilo's submission with regard to the failure of the trial judge to sum up the case to the assessors

properly as required by the law. She argued that the record of appeal indicates that the trial judge did not sum up to the assessors the vital points of law stated by the appellant's counsel. Nonetheless, she stated, the trial judge thoroughly discussed the said vital points in her judgment and relied upon to ground the conviction of the appellant. She also entirely agreed with Mr. Mbwilo that the omission of the trial judge was fatal as it rendered the participation of assessors meaningless contrary to the requirement of the law, that is, section 265 of the CPA. She equally agreed that the omission rendered the trial proceedings a nullity. To support her stance, she made reference to the decision of the Court in **Geofrey Ntapanya and Ndongo Mbeshi v. The Republic**, Criminal Appeal No. 232 of 2019 (unreported).

On the other hand, Ms. Makombe submitted that though there is no indication that the trial judge recorded that she informed assessors of their responsibility before the trial commenced, the omission did not prejudice the appellant as the record of appeal shows that the assessors participated fully during the trial by asking questions to witnesses and gave their opinion after the summing up by the trial judge.

As to the way forward, it was submitted by Ms. Makombe that only the proceedings from the summing up to assessors to the end be nullified, followed by quashing the conviction and setting aside the sentence, leaving intact the proceedings before the summing up. She submitted that, after

nullifying part of the proceedings, the record of the case be placed before another judge for a fresh summing up before the same set of assessors considering that the trial judge has retired. When prompted if she would maintain the same position should it become impracticable to get the same set of assessors, she submitted that, if that will turn out to be the case, a fresh trial will have to be ordered before another judge and separate set of assessors.

In rejoinder, Mr. Mbwilo reiterated his earlier prayer that if it may turn out to be impracticable to secure the attendance of the trial judge who has retired and the same assessors who sat with her, a retrial of the case will be in the interest of justice.

For our part, firstly, we entirely agree with Ms. Makombe that owing to the record of appeal and the circumstances of the case, the omission of the trial judge to indicate clearly that she informed assessors their role before the trial commenced did not prejudice the appellant. Our perusal of the record of appeal indicates that assessors participated actively in the trial by doing what they were supposed to do as required by the law. We therefore find this complaint to have no basis.

Secondly, having carefully perused the summing up notes of the trial judge, we entirely agree with the concurrent submissions by the counsel for the parties that, the summing up of the case to the assessors was not in accordance with the requirement of the law. It is evident as per the record

of appeal that, the summing up notes contain only the summary of the evidence of the case for both parties without more.

It is unfortunate that in her summing up notes, the trial judge, with respect, did not even inform assessors the offence with which the appellant stood charged, the burden of proof in the case and the ingredients of the offence that had to be proved by the prosecution. Indeed, as concurrently, submitted by the parties' counsel, she did not inform and explain to the assessors the other salient vital points of law which formed the basis of the case which she later discussed in her judgment and relied upon in grounding the conviction of the appellant.

In short, according to the record of appeal, during the summing up, the trial judge simply summarized the evidence for both sides and then asked assessors to state their opinions in terms of section 298 (1) of the CPA without informing and explaining to them the vital points. We are settled that the trial judge's omission was fatal as the nature of the summing up reflected in the record of appeal could not have assisted the assessors to give an informed opinion based on their understanding of the case and the trial judge's explanation which she had to make with regard to the relevant pieces of evidence she later discussed and ultimately relied upon to reach the findings in the case.

In **Masolwa Samwel v. The Republic,** Criminal Appeal No. 206 of 2014 (unreported), the Court emphasized the importance of trial judge's

compliance with the requirement to address assessors on vital points of law in the following terms:

> *"There is a long and unbroken chain of decisions of the Court which all underscore the duty imposed on trial High Court judges who sit with the aid of assessors, to sum up adequately to those assessors on all vital points of law:- There is no exhaustive list of what are the vital points of law which the trial High Court should address to the assessors and take into account when considering their respective judgment."*

We are aware that for a summing up to be considered as tainting the trial, the omission by the trial judge must have gone to the extent of prejudicing the appellant and thus causing miscarriage of justice. In **Jackline Exsavery v. The Republic**, Criminal Appeal No. 485 of 2019 (unreported), the Court stated thus:

> *"For a summing up to be considered as affecting the trial, it must have left out points that are vital for the determination of a particular case and affected the opinion of the assessors, thereby prejudicing the appellant or leading to a miscarriage of justice".*

In the case at hand, as we have shown in the course of our deliberation above, there is no doubt as contended by counsel for the parties that save for the summary of the evidence of the case for both

sides, the trial judge, with respect, did not indicate and explain to the assessors any of the vital points which she later relied upon to determine the case against the appellant. Certainly, the appellant was prejudiced by the omission as the assessors' opinions were affected by non-direction of the vital points to them by the trial judge. As a result, miscarriage of justice was caused to the appellant due to inadequate summing up to the assessors by the trial judge.

In **Bashiru Rashid Omar v. SMZ**, Criminal Appeal No. 83 of 2009 (unreported), the Court stated as follows with regard to what should be included in the summing up:

> *"... The trial judge ought to have shown in the record the following:*
>
> *1. The summing of the facts of the case.*
>
> *2. The evidence adduced.*
>
> *3. Explanation of the relevant law e.g., the ingredients of offence, malice aforethought e.t.c.*
>
> *4. Any possible defence and the law regarding the defence".*

It is in this regard that in **Mbalushimana Jean-Marie Vianney @ Mtokambali v. The Republic**, Criminal Appeal No. 102 of 2016 (unreported) the Court stated that:

> *"...the opinion of assessors has a potential to be of great value where the assessors fully understand the facts of the case before them as it relates to the relevant law. That, where the law is not*

explained and the assessors are not drawn to salient facts of the case, the value of their opinion is invariably reduced".

In the present case, we are satisfied that the inadequate summing up by the trial judge denied assessors the appreciation of the real controversy involved in resolving the case against the appellant. Given the nature of the summing up, it is plain that assessors could not have given a fair opinion on the case.

With regard to the consequences upon the failure of the trial court to sum up adequately, the Court stated as follows in **Ahazi Kilowoko v. The Republic**, Criminal Appeal No. 254 of 2019 (unreported).

"....it is an established principle that where there is a failure by a trial court to direct assessors on vital points of law, the remedy is to nullify the proceedings, quash judgment and conviction, set aside sentence and order a retrial de novo. However, there are particular situations where a fresh trial of case may be impracticable. In such situation, the Court has found it appropriate to leave the proceedings up to the summing up stage intact, quash only the summing up proceedings and those following from that stage order the trial court to sum up the case afresh to the assessors"

We are also aware that the Court for instance in **D.P.P v. Ismail Shebe Islem & Others,** Criminal Appeal No. 266 of 2016, **Michael**

Maige v. The Republic, Criminal Appeal No. 153 of 2017 and **Mashaka Mbawala Athuman@ Makamba v. The Republic,** Criminal Appeal No. 107 of 2020 (all unreported) found appropriate to nullify only the proceedings from the summing up, quashed conviction and set aside the sentence and left the remaining proceedings intact. Nevertheless, there is no doubt that the determination of this matter depends on the circumstances of each case. In the case at hand, we are alive to the contending arguments of the counsel for the parties with regard to the extent of the trial court's proceedings to be nullified and the appropriate order which should be made by the Court.

We have seriously pondered on the issue and considered the nature and circumstances of the case at hand. Considering the fact that the trial judge has retired from service, the factual setting on record and the possible difficulty of securing the same set of assessors who sat with the trial judge due to the time which has passed, we think ordering a retrial of the case is the best option in the circumstances. In the result, we allow the sole ground of appeal and find the appeal to have merit.

Consequently, we nullify the trial court's proceedings in respect of Criminal Sessions Case No. 29 of 2014, quash conviction and set aside the sentence imposed on the appellant. Ultimately, we order that the record in Criminal Sessions Case No. 29 of 2014 be remitted to the High Court for a retrial before another judge in accordance with the current requirement of

the law, that is, section 265(1) of the CPA with regard to the involvement of assessors.

In the meantime, the appellant shall remain in custody pending retrial.

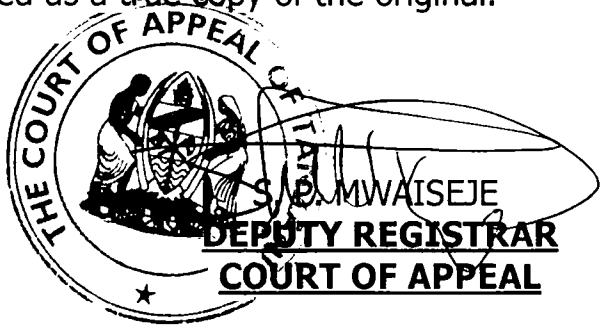
DATED at **MBEYA** this 6th day of December, 2022.

F. L. K. WAMBALI
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The Judgment delivered this 7th day of December, 2022 in the presence of Mr. Baraka Mbwilo, learned counsel for the appellant and Ms. Xaveria Makombe, learned State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.



S. P. MWAISEJE
DEPUTY REGISTRAR
COURT OF APPEAL