

IN THE COURT OF APPEAL OF TANZANIA

AT IRINGA

CORAM: WAMBALI, J.A., SEHEL, J.A. And MAIGE, J.A.)

CRIMINAL APPEAL NO. 543 OF 2020

ZAWADI FABIAN @ MLOWE APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

**(Appeal from the Decision of the High Court of Tanzania
at Iringa sitting at Njombe)**

(Kente, J.)

dated the 7th day of October, 2020

in

Criminal Sessions Case No. 97 of 2016

JUDGMENT OF THE COURT

20th & 27th March, 2023

MAIGE, J.A.:

This appeal emanates from the decision of the High Court of Tanzania at Iringa sitting at Njombe (the trial court) which convicted the appellant of the offence of murder contrary to section 196 of the Penal Code (the Penal Code) and sentenced him to death by hanging.

The facts on the basis of which the appellant was convicted is not difficult to narrate. It started on the 14th day November, 2019 when Patricia John Mkongwa (PW1) along with her son one Philbert Mahembe went to Limage village within the District and Region of Njombe to visit her

mother Immaculate Mbuligwe (the deceased). PW1 did not find the deceased at home and instead, she found the appellant somewhere around the house. When she asked him as to the whereabouts of the deceased, the appellant informed her that she had gone to visit her daughter at Igominyi village. When she revealed to him that she was the very daughter of the deceased, the appellant said he could not know where the deceased had been.

PW1 was not satisfied with what the appellant told her. On the same day, she made inquiries to the ten-cell leaders and some neighbors as to the whereabouts of the deceased but in no avail. On the next day, she reported the incident to the chairperson of the hamlet one Vitalis Simon (PW2) who advised her to go back to the home residence of the deceased for further inquiry but the appellant gave a similar answer. The issue was ultimately reported to the village chairman and the village executive officer who soon thereafter appeared at the place and found some villagers had gathered thereat. On being further probed by the said leaders, the appellant allegedly admitted to have killed the deceased and led them to the pit latrine where the dead body of the deceased was exhumed.

Afterwards, the appellant was arrested and taken to Njombe police station and upon being interviewed by Godlisten Kundaali Ndosa (PW4), he allegedly confessed to have murdered the deceased.

In his defense, the appellant denied the charge and asserted that, it were Longinius Mbuligwe, Edimerick Mkongwa and Neema Hongoli who murdered the deceased. He denied being arrested in connection with the offence and linked his arrest with PW1's complaint that, he was publicly smoking. He denied as well presence at the village on the date of the death of the deceased in the same way as he denied that he was the one who led the village leaders to the place where the deceased was buried. On top of that, he denied that the alleged confession was voluntary and contended that he was forced, by torture, to sign some documents whose contents he did not know.

Having assessed the evidence adduced, the trial court concurred with the three gentle assessors who sat with him that; the case against the appellant was proved beyond reasonable doubt. The trial Judge was convinced by the circumstantial evidence of PW1 and PW2 as concretized by the confessional statement in exhibit P3 that, the appellant was the author of the untimely death of the deceased. More importantly, the trial

judge largely relied on the confessional statement in exhibit P3 because it was admitted without objection and that it gave *"a graphic account as to why, how and by who, the idea to murder the deceased was contrived and finally executed"*.

Being dissatisfied with this decision, the appellant has appealed to the Court. On 24th day of December, 2020, the appellant filed the substantive memorandum of appeal consisting of nine grounds. On 15th March, 2023 however, the substantive memorandum of appeal was substituted with the current one containing the following grounds in the alternative:

1. That the trial courts' proceedings and judgment are null and void for want of a proper and correct summing up to assessors as required by law.

Alternatively to the first ground of appeal;

2. The honorable Judge erred in law and fact in admitting and relying upon exhibit P2 (the appellant's extra-judicial statement) in convicting the appellant.

3. That from the evidence on the record, the honorable Judge erred in law and fact in convicting the appellant with the offence of murder while the case was not proved beyond reasonable doubt.

At the hearing, Mr. Jally Willy Mongo, learned advocate, appeared for the appellant whereas Ms. Chivanenda Tharsis Luwongo, learned Senior State Attorney, appeared for the respondent Republic.

In his submissions, Mr. Mongo started with the first ground of appeal by criticizing the summing up notes of the trial Judge appearing at pages 72 and 73 of the record of appeal for contravening the mandatory requirements of section 298(1) of the Criminal Procedure Act Cap. 20 of the laws of Tanzania (the CPA). He mentioned two requirements which were not observed in the summing up notes. **One**, the substances of the evidence involved in the case. **Two**, explanations of some vital points of law involved in the case. He submitted that, although the appellant was convicted on circumstantial evidence and confessional statements, the gentle assessors were not guided on the relevancy and applicability of those principles before giving the opinions on the guilt or otherwise of the appellant. They were furthermore not addressed on the meaning of the defense of alibi which apparently was relied by the appellant. Citing the case of **Godfrey Mfuse v. R**, Criminal Appeal No. 174 of 2020 [2022] TZCA 665; [03 November 2022 TANZLII]. Mr. Mongo urged us to allow the first ground of appeal. In the circumstances, he urged use to invoke the provisions of section 4(2) of the Appellate Jurisdiction Act, Cap. 141 of the

laws of Tanzania and reverse, nullify the proceedings of the trial court and set aside the sentence of death imposed on the appellant.

Submitting on what should be the appropriate way forward, Mr. Mongo contended that though under the general rule retrial would be the right option, in the circumstances of this case where the trial Judge relied on the extra judicial statement in exhibit P2 which he had dispensed with and a retracted confessional statement in exhibit P3, there is no sufficient evidence which can prove the case against the appellant beyond reasonable doubt. In his humble submission, remittance of the matter to the trial court for retrial would allow the prosecution to fill the pointed-out gaps in the prosecution evidence. In his submission, therefore, the proceedings, conviction and sentence of the trial court should be nullified and the appellant set free forthwith.

In her submission in reply, Ms. Luwongo entirely subscribed to Mr. Mongo's submission on the first ground that, the trial court's summing notes on the record of appeal were fatally defective for violating the provisions of section 298(1) of the CPA. However, she was not in agreement with him on what should be the action after nullifying the proceedings of the trial court, quashing the conviction and setting aside the

sentence. To her, retrial is the appropriate option. To that effect, she referred us to the case of **Shadida Issa @ Rasta v. R**, Criminal Appeal No. 125 of 2019[2021] TZCA 574; [7 October 2021 TANZLII]. Unlike Mr. Mongo, she was of contention that, there is sufficient evidence to prove the case without filling the gaps in evidence.

We have heard the counsel's submissions on the first ground of appeal. Before we proceed, it may be necessary to observe that, prior to the changes introduced by the Written Laws (Miscellaneous Amendments) Act No. 1 of 2022, the law, as per section 265 (1) of the CPA was to the effect that, all trials by the High Court should be by aid of assessors. Section 298 thereof, which appears to have not been affected by the respective amendment provides that;

"298-(1) When the case on 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 opinion orally as to the case generally and as to any specific question of fact addressed to him by the judge, and record the opinion."

In effect, the above provision as rightly submitted by both the counsel, obliges the trial judge before inviting the gentle assessors to

opine, to address them on the substances of the evidence adduced by both sides and any specific vital questions of law that may arise from the evidence. Failure to comply with the requirement, it is settled, vitiates the judgment and proceedings of the trial court. See for instance, **Omari Khalfan v. R**, Criminal Appeal No. 107 of 2015 [2022] 658; [31 October, 2022 TANZLII], **Godfrey Mfuse v. R** (supra) and **Shadida Issa @ Rosta v. R**, (supra). The logic behind the requirement was discussed in the case of **Nelson Mkini v. R**, Criminal Appeal No. 171 of 2020 [2022] TZCA 658; [31 October, 2022 TANZLII] in the following words:

"The rationale behind the requirement lays on the fact that, a meaningful assessor's opinion depends upon there being a proper and adequate explanations by the trial Judge of the salient features of the case and the principles of law involved. It follows thus, in the absence of adequate and correct summing up, it cannot be said that the opinions of the assessors were founded on correct apprehension of the evidence adduced and the principles of law governing reliability of such evidence".

In the case at hand, we agree with the concurrent submissions of both counsel that, the summing up notes to the assessors reflected at

pages 72 and 73 of the record of appeal are not in conformity with the requirement of section 298(1) of the CPA. As submitted for the appellant, contrary to the law, the substances of the evidence adduced by both sides are not there. Equally so, for the vital points of law involved in the case including but not limited to, circumstantial evidence, confession statement, implied confession, corroborating evidence and the defense of *alibi*. For those reasons, therefore, we allow the first ground of appeal.

The question that follows before we wind our judgment is, what should be the appropriate way forward. There are contending views of the counsel on this issue. For Mr. Mongo, he would want us to nullify the proceedings of the trial court, quash conviction, set aside the sentence and set the appellant free. That is not without reasons. It is because an order for retrial would enable the prosecution to fill gaps as there is no sufficient evidence to prove the case. For the respondent, it has been argued to the contrary as in view of the learned Senior State Attorney, there is ample evidence to prove the case without filling gaps in evidence.

We have taken time to seriously consider the counsel's rival submissions in line with what are on the record of appeal and the relevant principle of law in **Fatehali Manji v. R** [1966] E.A and, we are of the

considered opinion that; considering the factual setting, retrial is in the interest of justice. In the circumstance, we shall not consider the last two grounds of appeal which were just in the alternative to the first ground.

Accordingly, therefore, we nullify the entire proceedings of the trial court, quash conviction and set aside the sentence of death imposed on the appellant. We further order that the appellant should be retried expeditiously before another Judge in compliance of the requirement under the current provisions of section 265 of the CPA in respect of involvement of assessors. In the meantime, the appellant shall, in the meanwhile remain in custody.

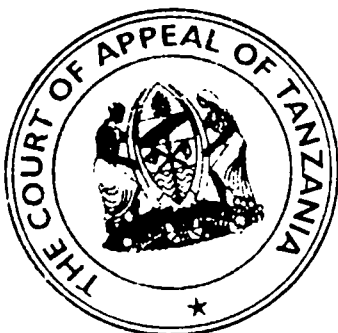
DATED at **IRINGA** this 25th day of March, 2023.

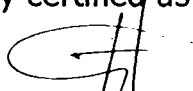
F. L. K. WAMBALI
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

The judgment delivered this 27th day of March, 2023 in the presence of the appellant in person and Ms. Hope Charles Massambu, learned State Attorney for the respondent Republic, is hereby certified as a true copy of the original.




G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL