IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: MUSSA, J.A., MUGASHA, J.A., And MKUYE, J.A.)

CRIMINAL APPEAL NO. 562 OF 2015

CHACHA MATIKO @ MAGIGE.....APPELLANT
VERSUS
THE REPUBLIC.....RESPONDENT

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

(Kitusi, J.)

Dated the 13th day of November, 2015
in
Criminal Session Case No. 122 of 2013

.....

JUDGMENT OF THE COURT

18th & 27th April, 2018

MUSSA, J.A.:

In the High Court of Tanzania, Mwanza Registry, the appellant was arraigned for murder, contrary to section 196 of the Penal Code, Chapter 16 of the Revised Edition. The prosecution allegation was that on the 11th day of December, 2012, at Gibaso Village, within Tarime District, the appellant murdered a certain Marwa Kiruka @ Nyangari.

The appellant denied the accusation, whereupon the prosecution featured three witnesses and one documentary exhibit (postmortem report) to support its claim. On his part, the appellant had himself as a sole witness and had no exhibit to produce. On the whole of the evidence, the

learned trial judge (Kitusi, J.) was satisfied that the prosecution established its case to the hilt. The appellant's defence was considered but rejected and, in the upshot, the appellant was found guilty, convicted and handed down the mandatory death sentence. He is aggrieved and presently seeks to impugn both the conviction and sentence.

At the hearing before us, the appellant was represented by Mr. Salum Magongo, learned Advocate, whereas the respondent Republic had the services of Mr. Juma Sarige, learned Senior State Attorney. In support of the appeal, the learned counsel for the appellant had filed four grounds of grievance which go thus:-

> *"1. That the failure to give the appellant the opportunity to participate in the selection of assessors rendered the trial to be conducted without the aid of assessors.*
>
> *2. That the trial court erred in law by allowing the assessors to hear the evidence of PW3 in respect of the appellants confession without first testing the voluntariness of the said confession.*
>
> *3. That as the Post Mortem Examination Report was not read in court after its admission the trial judge erred in taking it into account in arriving at the decision to convict the appellant.*
>
> *4. That in the absence of compliance with the provisions of section 293 (1) of Criminal Procedure Act the trial*

Judge had no basis for invoking the provisions of section 293 (2) of the Criminal Procedure Act."

Addressing us on the first ground of appeal, Mr. Magongo criticized the trial court for not affording the appellant an opportunity to express whether or not he objected to the selected assessors or any of them. The learned counsel submitted that it was not for the appellant's counsel to assume that role, as was the case in the situation at hand; rather, it was for the appellant himself to express whether he was uncomfortable with any or all the selected assessors. On account of the non-compliance, counsel concluded, the trial could not be said to have been with the aid of the assessors and, accordingly, the same is a nullity. To buttress his contention, Mr. Magongo referred us to an old but unreported Criminal Appeal No. 176 of 1993 – **Laurent Salu and Five Others Vs. The Republic.**

As regards the second ground of appeal, the learned counsel for the appellant also criticized the trial court for accepting an alleged confessional statement of the appellant which was not proved in accordance with the law. Mr. Magongo submitted that section 27(2) of the Evidence places the onus of proving the voluntariness of a confession on the shoulders of the prosecution. In addition, he said, having interviewed the appellant, PW3 was obliged to cause the interview to be recorded in terms of section 57(1)

of the Criminal Procedure Act, Chapter 20 of the Revised Edition (the CPA). On account of the foregoing shortcomings, Mr. Magongo urged us to expunge from the record, the entire testimony of PW3.

Coming to the third ground of appeal, the learned counsel for the appellant additionally criticized the presiding officer for not causing the postmortem report to be read over in court upon its production in evidence. In the result, he submitted, the assessors as well as the appellant were denied the opportunity of knowing the contents of the report. Mr. Magongo similarly advised us to expunge the report from the record of the evidence.

Finally, in the fourth ground, Mr. Magongo submitted that, in the absence of compliance with the provisions of section 293(1) of the CPA, the trial judge had no basis for invoking the provisions of section 293(2) of the CPA. To fortify his contention, the learned counsel for the appellant referred to us two unreported decision of the Court, viz – Criminal Appeal No. 39 of 2007 – **Stephen Mhoro @ Ngaza Sarehe Vs The Republic** and Criminal Appeal No. 207 of 2014 – **Ex D. 1995 Pc Ahmed Vs The Republic.**

In sum, Mr. Magongo urged that the cumulative effect of the irregularities was to such an extent that the appellant was not accorded a

fair trial just as he was unduly prejudiced. The learned counsel for the appellant, accordingly, advised us to allow the appeal by setting aside the conviction and sentence.

On his part, Mr. Sarige resisted the appeal. Addressing us on the first ground of appeal, the learned Senior State Attorney submitted that the appellant had the services of an advocate who clearly expressed, on behalf of the appellant, that he did not object to any of the selected assessors. In his view, the expression of the advocate, on behalf of the appellant, was sufficient to offset the requirement.

As regards the second ground of appeal, Mr. Sarige conceded that it was a misnomer for PW3 not to fortify the alleged appellant's confessional statement with the record of the interview. He, however, pleaded that it is only the portion of PW's testimony which referred the oral confessional statement of the appellant which should be expunged from the record. The learned Senior State Attorney just as well conceded that it was wrong for the trial court for not causing the postmortem report to be read over in court. Nonetheless, as he conceded to the prayer for it being expunged, Mr. Sarige was quick to rejoin that the other available evidence sufficiently established the fact and cause of death. Finally, on the fourth ground, the learned Senior State Attorney had a short answer: the appellant was not

prejudiced by the omission of the trial judge to refer to section 293(1) of the CPA.

We have anxiously considered the learned rival contentions by counsel from either side. In our determination, we propose to first address the complaint relating to the omission, by the trial court, to give the appellant the opportunity to express whether or not he object to the selected assessors. In this regard, we need to do no more than reiterate the statement of principle as meticulously laid down in the case of **Laurent Salu** (supra) thus:-

> *"Admittedly the requirement to give the accused the opportunity to say whether or not he objects to any of the assessors is not a rule of law. It is a rule of practice which, however, is now well established and accepted as part of the procedure in the proper administration of criminal justice in this country. The rationale for the rule is fairly apparent. The rule is designed to ensure that the accused person has a fair hearing. For instance, the accused person in a given case may have a good reason for thinking that a certain assessor may not deal with this case fairly and justly because of, say, a grudge, misunderstanding, dispute or other personal differences that exist between him and the assessor. In such circumstances in order to ensure*

impartiality and fair play it is imperative that the particular assessor does not proceed to hear the case; if he does then, in the eyes of the accused person at least, justice will not be seen to be done. But the accused person, being a layman in the majority of cases, may not know of his right to object to an assessor. Thus in order to ensure a fair trial and to make the accused person have confidence that he is having a fair trial, it is of vital importance that he is informed of the existence of this right. The duty to so inform him is on the trial judge, but if the judge overlooks this, counsel who are the officers of the court have equally a duty to remind him of it.

In the instant case, it is not known if any of the accused persons had any objection to any of the assessors, and to the extent that they were not given the opportunity to exercise that right, that clearly amounts to an irregularity."

To resume to the matter under our consideration, we are, so to speak, similarly, perturbed by the trial court's omission. It is, indeed, obvious that this disquieting aspect of the proceeding was occasioned by the laxity of the trial court and the issue facing us is as to what order should fittingly be made to avoid a failure of justice. Whilst we unhesitatingly accept that the nullification of the entire proceedings of the

two courts below is unavoidable, it remains to be considered whether or not an order for retrial is fitting in the circumstances of this case. In that regard, we have dispassionately pondered over Mr. Sarige's invitation to nullify the entire proceedings with an order for a new trial. True, on several occasions, this Court had ordered a retrial in situations where the trial proceedings were vitiated by the laxity of the presiding officer for which the prosecution was not to blame (see, for instance, the decision in **M'kanake V R** [1973] E.A. 67; as well as the unreported decisions in Criminal Appeal No. 141 of 2010 – **Marko Patrick Nzumila V R** and; Criminal Appeal No. 199 of 2010 – **Makumbi Ramadhani Makumbi and four others V R**). In, for instance, the referred case of **Nzumila** the Court remarked: -

> *"The term "failure of justice" has eluded a precise definition, but in criminal law and practice, case law has mostly looked at it from an accused /appellant's point of view. But in our view the term is not designed to protect only the interests of the accused. It encompasses both sides in the trial. Failure of justice or (sometimes, referred to as "miscarriage of justice") has, in more than one occasion been held to happen where an accused person is denied an opportunity of an acquittal (see for instance* ***WILLIBARD KIMANGO V. R.***

Criminal Appeal No. 235 of 2007 (unreported)) but in our considered view, it equally occurs where the prosecution is denied an opportunity of a conviction. This is because, while it is always safe to err in acquitting than in punishment, it is also in the interests of the state that crimes do not go unpunished. So, in deciding whether a failure of justice has been occasioned, the interests of both sides of the scale have to be considered.

In the present case by unwittingly allowing PW1, PW2 and PW7 to give unaffirmed testimony, the trial court certainly prejudiced the prosecution case substantially as those were crucial witnesses for its case but for which they were not to blame for giving of their evidence in violation of the law. To that extent, we think, there was a failure of justice"

Thus, on a parity of reasoning, the omission by the trial court, to afford the appellant an opportunity to express whether or not he objects to any of the assessors, certainly prejudiced the appellant as well as the prosecution. But, as we shall shortly demonstrate, such is not the sole factor to be taken into consideration and, what is more, even where, say, the prosecution is not the blame-worthy party, it does not necessary follow that a retrial should be ordered. In, for instance, the case of **Fatehali Manji V R** [1966] E.A. 334 the following factors were highlighted: -

> *"In general a retrial will be ordered only when the original trial was illegal or defective, it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial;* ***even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered, each case must depend on its own facts and circumstances and an order for retrial should only be made where the interests of justice require it.***"
>
> [Emphasis supplied.]

We may add to these factors that an order for retrial would not be made where, on the whole of the evidence, the conviction is unsustainable. This will certainly guard against the prospect of giving the prosecution a chance to fill in gaps in its evidence at the trial.

Having the foregoing considerations in mind, it is now opportune for us to determine whether or not a retrial will meet the justice of this case. If we may express at once, it is beyond question that the trial was evenly contested by either side. To this end, all things being equal, we are fully satisfied that, in the circumstances of this case, a retrial is justifiable.

In sum, we are constrained to allow the appeal and, in fine, the entire proceedings and decisions of the two courts below are, hereby, nullified with a consequential order of a retrial before another judge of competent jurisdiction and a new set of assessors. In the meantime, the appellant should remain in custody while he awaits the resumption of the trial. Having so determined, we need not belabour on the remaining grounds of appeal. Order accordingly.

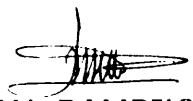
DATED at **MWANZA** this 26th day of April, 2018.

K. M. MUSSA
JUSTICE OF APPEAL

S. E. A. MUGASHA
JUSTICE OF APPEAL

R. K. MKUYE
JUSTICE OF APPEAL

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



P.W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL