INTHE COURT OF APPEAL OF TANZANIA
AT ZANZIBAR

(CORAM: RUTAKANGWA,J.A., MBAROUK,J.A., And BWANA,J.A.)

CRIMINAL APPEAL NO. 185 OF 2012

JEREMIAH PASKAL GABRIEL.....APPELLANT
VERSUS
DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

(Appeal from the decision of the High Court of Zanzibar)

(Makungu, C.J.)

Dated 18th day of January, 2012
in
Criminal Case No. 187 of 2007

JUDGMENT OF THE COURT

5th & 11th December, 2012

BWANA, J.A.:

The appellant, Jeremiah Paskal Gabriel, was charged with and convicted of the offence of Murder contrary to sections 196 and 197 of the Penal Act, No. 6 of 2004 of the Laws of Zanzibar. He was sentenced to suffer death by hanging, a mandatory punishment for similar offences. Aggrieved by that decision of the trial court, the High Court of Zanzibar, he lodged this appeal. Before us the appellant was represented by Mr. Abdallah Juma Mohamed, learned counsel while the respondent, Director

of Public Prosecutions (the DPP) was represented by Mr. Suleman Masoud Makame, learned State Attorney.

In his Memorandum of Appeal, the appellant raised several grounds which may be summed up as follows:-

- That he was convicted and sentenced basing on weak prosecution evidence.
- That he was convicted and sentenced relying on the evidence of a single witness, a child of tender years.
- That the trial court failed to properly sum up and direct the assessors on vital points of the law and procedure.
- That the trial court failed to evaluate and consider the defence of alibi raised by the appellant.

In his address before us, Mr. Mohamed, learned counsel, amplified on the above issues, citing several case laws in support of his submission. He urged the Court to allow the appeal and set free the appellant.

Mr. Makame, on his part, supported both the conviction and sentence meted out on the appellant, strongly supporting the findings of the trial court. He was of the view that the evidence of the single witness, John Ramadhani, aged 10 years then, was credible and reliable, in so far as identification, both visual and voice, of the appellant were concerned. He further stated that contrary to the claims by Mr. Mohamed learned counsel, the trial judge's summing up to the assessors was adequate and properly done. All in all Mr. Makame was of the view that the prosecution had proved its case to the required standard, that is, beyond reasonable doubt and the conviction and sentence imposed on the appellant were fair and in accordance with the dictates of the law.

Having considered the submissions by both learned counsel and having perused through the case record before us, we are of the considered view that this appeal may be determined by considering the issue of the role of assessors in the conduct of criminal trials of this kind. For purposes of this appeal, sections 262 and 279 of the Criminal Procedure Act No. 7 of 2004 (the CPA) are relevant. Section 262 provides:-

If the accused pleads not guilty, or if a plea of not guilty is entered in accordance with the provisions of section 260 of this Act, ***the court shall proceed to choose assessors*** *as hereinafter directed and to try the case" (Emphasis provided).*

On its part section 279(1) of the CPA provides further:-

"When the case on both sides is closed, the judge ***may sum up the evidence*** *for the prosecution and defence,* ***and shall then require*** *each of the assessors to state his opinion orally and shall record such opinion." (Emphasis provided).*

Therefore under section 262 (supra) it is evident that trial with the aid of assessors is mandatory, in certain cases, such as the present one. At the end of such a trail, the judge is under obligation to sum up to the said assessors and record their opinion. The words "may sum up to assessors" as used in section 279(1) (supra) may sound discretionary but practice has it that they are binding to a trial judge. The said summing up has to be

adequate and proper so as to make the assessors knowledgeable with the issues involved in a particular case. These are issues of both fact and law. This will help, in our view, the assessors to give considered opinion in so far as the case is concerned.

In the instant case, can it be said then, that the summing up by the trial judge was adequate and proper? The learned counsel for the appellant is of the opinion that it was not while the learned State Attorney holds different views. He believes the said summing up was adequate and proper.

Pages 112 and 113 of the case record have the impugned summing up. Briefly put, it is a summary of what some of the prosecution witnesses testified on as well as a summary of what the appellant stated in his defence. Was such summary adequate to the circumstances of this case?

We hold that it was not. Together with addressing the factual issues as stated by PW 4, PW 7 and PW 8, the trial judge did not address the assessors on the particular and pertinent issues of law and fact involved in

the case. Such issues included, inter alia, the implication of relying on the evidence of a single prosecution witness and who was a child of tender age at the time; the issue of identification, both visual and voice, at night and what are the requirements to be satisfied as the law provides; ingredients of the offence of murder (e.g. malice aforethought) and whether, given the evidence at hand, they were proved beyond reasonable doubt, implicating the appellant; the defence of alibi, as raised by the appellant whether it raised reasonable doubt in the mind of the assessors; dying declaration, if any, and how it could be relied upon in support of the prosecution case; "**ejusdem generis**." All the aforestated issues were pertinent, in so far as this case is concerned. The assessors ought to have been addressed on them so as to give a clear and adequate position over the issues before them.

We believe that it is due to inadequate briefing on those pertinent issues that the two assessors present could not give clear opinions as to the liability or otherwise of the appellant. For example, it is on record that when asked, for his opinion, assessor no. 1 stated:-

"My lord, from the witnesses of the case and the whole proceeding of the case, it is my opinion that the accused is guilty of the offence and I rest (sic) the matter to the court to decide."

When asked for his opinion, likewise assessor no. 2 stated:-

"....the pictures show that the body was cut by sword in various parts of her body. My opinion is that the accused is reliable (sic) with the death of Yasinta John. I rest (sic) the matter to the court to decide."

It is evident, therefore, that because of the brief summing up by the learned trial judge, the assessors were not fully given opportunities to give fair and balanced opinions in the matter.

What are the consequences of such inadequacy then? There is no dearth of authorities on the subject. In **Abdallah Bazamiye and Others vs Republic** (1990) TLR 42 et seq, this Court held:

".....they (the assessors) were denied their statutory right, they were disabled from

effectively aiding the trial judge.....the assessors' full involvement in the trial is an essential part of the process....."

In the **Bazamiye** case (supra) such inadequacy by the trial judge was considered to be fatal thus rendering the trial a nullity. In **Charles Samson v Republic** (1990) TLR 39 et seq, the Court concluded thus:-

"In the present case the court appears to have taken no cognizance whatsoever of the alibi, both in summing up to the assessors....There was thus a mistrial and a consequential miscarriage of justice. We are bound therefore to allow the appeal by declaring the trial a nullity, quashing the proceedings and directing that a new trial of the appellant be undertaken...."

We subscribe to the above views. In light of our discourse hereinabove, we are of the considered view that it disposes of this appeal. There is no need, therefore to consider the other grounds of appeal.

In conclusion, we allow the appeal. We declare the trial before the High Court to be a nullity. We therefore, quash the proceedings and order that a trial de novo be conducted.

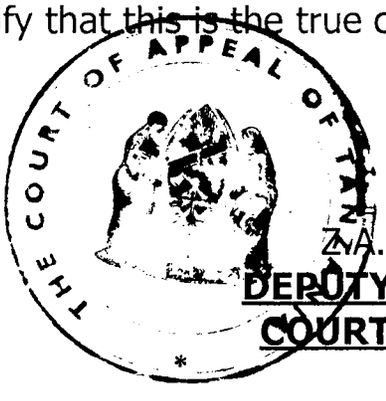
DATED at **ZANZIBAR** this 6th day of December, 2012.

E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

M.S. MBAROUK
JUSTICE OF APPEAL

S.J. BWANA
JUSTICE OF APPEAL

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



Z.A. MARUMA
DEPUTY REGISTRAR
COURT OF APPEAL