IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: RUTAKANGWA, J.A., MUSSA, J.A., And JUMA, J.A.)

CRIMINAL APPEAL NO. 206 OF 2014

MASOLWA SAMWEL.....APPELLANT
VERSUS
THE REPUBLIC..... RESPONDENT

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

(De-Mello, J.)

dated 03rd day of April, 2014
in
(HC) Criminal Sess. Case No. 25 of 2010

JUDGMENT OF THE COURT

3rd & 5th June, 2015
JUMA, J.A.:

The appellant, Masolwa Samwel was in the High Court of Tanzania at Mwanza charged with the offence of murder contrary to section 196 of the Penal Code Cap. 16 R.E. 2002. The particulars of the charge leveled against him alleged that on 17th November, 2007 at Welemasanga village in Kwimba district of Mwanza Region he murdered Petro s/o Luhigo ("the deceased"). Two witnesses, Devota Luhigo (PW1) and A/Inspector Leonidas Mtawala (PW2) testified for the prosecution. The appellant testified in his own defence as DW1.

At the conclusion of the trial, the learned trial judge (De-Mello, J.) made the following finding, which precipitated this appeal:

> *"...The accused is guilty and the punishment entrenched in our law is that provided under* ***section 197*** *clearly stating;* ***section 197 – A person convicted of murder shall be sentenced to death.*** *It is so ordered."*

The salient facts found by the trial court trace back to around 6:00 p.m. on 17/11/2007. The deceased was at home, entertaining members of his family, friends and other guests. They were eating, drinking and enjoying themselves after a day-long work at his farm where his friends and family had collectively joined to assist him in the farm work as is the established tradition amongst the Wasukuma tribesmen of Tanzania. PW1, Devotha Luhigo, the deceased's sister who was present recalled how five people arrived suddenly while the partying was going on.

The newcomers went straight to where the deceased was. To the surprise of all those present, they proceeded to hack the deceased with machetes and hitting him with clubs which they brought along. While the attack was going on, the invaders made a point of warning all those present to lie down. When PW1 raised her voice for help, they turned on her. She was slashed at her left eye and on her leg. PW1 also witnessed an incident which should be described as nothing but bizarre. While the attack on the deceased was progressing, one of the assailants brought out a plastic container and collected blood flowing from the deceased's bleeding wounds. By the time the neighbours and other villagers arrived to offer help, the bandits had vanished, and her brother lay dead on the ground. PW1 insisted that it was the appellant, one Shumbi and another Mashimba, who were the

assailants. She managed to identify them because it was the deceased who in the first place invited them to join them in drinks and foods. In addition, the attack took place outside under bright moonlight which enabled her to identify the bandits.

The appellant denied the charge and pleaded not guilty. Appellant's cautioned statement was admitted as exhibit P2 without any objection from Mr. Emmanuel Sayi, his learned counsel. But in his defence when he testified as DW1, he retracted the confessional statement.

In this appeal, the appellant has through Magongo and Company Advocates preferred a total of four grounds of appeal. At the hearing of the appeal, Mr. Salum Magongo the learned counsel who appeared for the appellant abandoned the first, the third and the fourth grounds of appeal. He pursued the remaining second ground which contended that: *"...as the court did not address the assessors on the issues of voluntariness of the cautioned statement and alibi the trial was not conducted fully with the aid of assessors and therefore a nullity."*

Mr. Magongo submitted that in her summing up to the three lady assessors, the trial judge did not address them on voluntariness of the confessional cautioned statement (exhibit P2) and on the defence of alibi. These two, he noted further, are vital points of law which the trial judge needed to address to make the trial to be regarded as with aid of assessors. Mr. Magongo premised his elaboration on section 265 of the Criminal Procedure Act (CPA) which directs all trials of murder before the High Court must be with the aid of assessors.

In the summing up appearing on pages 15 to 17, Mr. Magongo pointed out, the trial judge does not address the three assessors on voluntariness of the

confessional statement and on the defence of alibi where the appellant suggested in evidence he was in another place on the date the incident of murder took place. The learned counsel referred us to the evidence on record on pages 12 and 13 where the appellant made claims of threats and force which extracted confession: *"I resisted and he forced me," "I never finger stamped statement" (sic), "I was tired of being mistreated"* –and submitted on the need for the assessors to be addressed on voluntariness of the retracted confessional statement. Mr. Magongo was quick to admit that Mr. Emmanuel Sayi the learned counsel who represented the appellant in the High Court did not object when the cautioned statement was tendered as evidence. This, he pointed out, does not take off the shoulders of the trial judge the duty to address the assessors and consider it in her judgment, more so where the appellant had in his evidence retracted the confessional statement. Mr. Magongo referred to the case of **Tulubuzya Bituro v. Republic,** [1982] T.L.R. 264 where this Court reiterated the law that failure of a trial judge to address the assessors on any important point of law is a non-direction which vitiates the whole trial.

On alibi, Mr. Magongo drew inspiration from the decision of the Court in Charles **Samson vs. Republic** [1990] T.L.R. 39 and submitted that the appellant had raised a possibility that he may not have been present at the scene of crime at all. This alibi was a vital point of law which the trial judge addressed it in passing in response to the prosecution's allegation that appellant had fled from his home after the incident. Apart from failing to address the defence of alibi it to the assessors as a vital point of law that is likely to affect the liability of the appellant, Mr. Magongo insisted that the trial judge also did

not, in her considered judgment, make any reference to the alibi and the voluntariness of the confessional statement.

Mr. Paschal Marungu, the learned Senior State Attorney who represented the respondent Republic initially did not support the appeal by disagreeing with Mr. Magongo on the failure by the trial judge to address the assessors on such vital points of law as voluntariness of confession and the defence of alibi. Placing reliance on a decision of the Court in **1. Msafiri Jumanne, 2. Peter Masina Kwacha, and 3. Kafuba Mwangilipi vs. Republic**, Criminal Appeal No. 187 of 2006 (unreported), Mr. Marungu attempted to impress on us that the failure to address the assessors on voluntariness of the confessional statement was a mere procedural irregularity which is not necessarily fatal to the trial and resulting conviction of the appellant. However, after showing him a long list of decisions of the Court which direct the trial judges to address the assessors on vital points of law, the learned Senior State Attorney came round to support Mr. Magongo on the latter's submission that in the instant appeal the assessors were not addressed on voluntariness of the confession and defence of alibi, both being vital points of law. Mr. Marungu was also concerned that the summing up which the trial judge presented to the assessors is in fact missing from the original record.

After coming to terms that section 265 of the CPA directing all trials before the High Court to be with the aid of assessors, was infringed, Mr. Marungu urged us to order a retrial, which should require the trial judge to address the assessors and proceed therefrom. On his part, Mr. Magongo insisted that the retrial should be conducted afresh, that is *de novo*.

After submitting on the sole ground of appeal, we in addition wanted the two learned counsel to address us on the question whether from the record, the trial judge convicted and sentenced the appellant. Mr. Magongo, after making reference to the provisions of section 312 of the CPA governing contents of judgments, he contended that no conviction was entered and hence there was no judgment within the meaning of sub-section (2) of section 312. Mr. Marungu's submission on this ground was cagey, to say the least because while conceding that the finding that **"A person convicted of murder shall be sentenced to death"** may not necessarily refer to the appellant the learned Senior State Attorney showed considerable reluctance to directly address himself whether the appellant was convicted upon being found guilty.

We shall first dispose of the issue we raised *suo motu*, whether or not, the appellant was convicted. It is an issue which by extension determines the competence of this Court to hear an appeal arising from a finding of guilty without subsequent conviction. We reproduce the operative part of the judgment of the trial court for full appreciation of what transpired:

> *"The accused is guilty and the punishment entrenched in our law is that provided under* ***section 197*** *clearly stating;* ***section 197- A person convicted of murder shall be sentenced to death.*** *It is so ordered.*
>
> ***J.A. De-Mello***
>
> ***Judge***
>
> ***sgd***

J.A. De-Mello

Judge

Magu this 3rd April 2014"

It is clear from above, after finding the appellant guilty, the learned trial judge stated that the consequent punishment is as provided under section 197. She then stated that a person convicted of murder shall be sentenced to death. The above operative part of the judgment has considerably belaboured our minds. It was quite tasking for us to determine whether the statement by the learned trial judge to the effect that- "***a person convicted of murder shall be sentenced to death.*** *It is so ordered...*"- sufficiently complies with the mandatory duty under section 235 (1) of the Criminal Procedure Act Cap 20 (CPA) which oblige the trial courts which find accused persons guilty of any offence, to **convict**.

There is a long list of decisions of the Court which not only interpret the scope of section 235 (1) of the CPA but also reiterate the duty to convict or acquit where applicable. The relevant provisions state:

> *"S. 235(1) The court having heard both the complainant and the accused person and their witnesses and the evidence,* ***shall convict the accused and pass sentence*** *upon or make an order against him according to law* ***or shall acquit him*** *or shall dismiss the charge under section 38 of the Penal Code."* [Emphasis added.]

For instance, in the case of **Jonathan Mluguani v. Republic,** Criminal Appeal No. 15 of 2011, CAT (unreported), the Court restated that:-

> "Section 235(1) *of the Criminal Procedure Act Cap. 20 RE 2002 imposes a duty on the trial court to enter conviction before embarking on the question of sentence. In other words conviction to precede sentence. To put it neater there cannot be a sentence without conviction..."*

In **Alli Ramadhani vs. R.**, Criminal Appeal No. 205 of 2013 (unreported) the Court stated:

> *"...There is no controversy, and it is the law that upon a verdict of guilt, a sentence must be prefaced by a conviction. Put it differently, there cannot be a sentence without conviction. This is the essence of section 235 (1) of the Criminal Procedure Act..."*

The above decisions, and many others like- **Mang'era Marwa Kubyo vs. R.,** Criminal Appeal No. 320 Of 2013, and **Jofrey s/o Lei Boo vs. R.,** Criminal Appeal No. 24 of 2013 (both unreported)]-- unanimously direct that upon finding an accused person guilty or even when on plea of guilty, conviction comes first before proceeding to sentence.

Again, even if we assume for the purposes of argument, that there was a conviction, the conclusion by the learned trial judge does not answer the

question whether the appellant is that person who was convicted of murder, and who should as a result, face the punishment of death. Since the particulars of the offence directly addressed the appellant, a conviction must not only be clearly entered against him upon being found guilty, but that conviction must also be clearly directed at specific offence for which the accused person has been found guilty. This is the essence of the law under section 312 of the CPA which Mr. Magongo cited to us. We agree with the learned counsel that the in the instant appeal before us, the learned trial judge did not comply with the mandatory provisions of sub-section (2) of section 312 of the CPA which require judgments to "***specify the offence of which, and the section of the Penai Code or other iaw under which, the accused person is convicted and the punishment to which he is sentenced***."

The problematic nature of the purported "conviction and sentence" which the learned trial Judge imposed is evident from the perspectives of the notice of appeal which the appellant lodged in this Court. The notice of appeal appearing on page 31 of the record has added more information than the judgment has provided. For instance, the notice asserts that **"...the appellant was convicted of MURDER c/s 196 OF THE PENAL CODE and sentenced to DEATH".** But the judgment of the trial court was not as forthcoming as the notice of appeal would like us to believe. It seems to us that in order to institute an appeal by way of Notice, the would-be appellant is expected by Rule 68 (2) of the Rules to extract from the judgment appealed from: **"the nature of the acquittal, conviction, sentence, order or finding against which it is desired to appeal."** Ideally, where the judgment subject of appeal lacks a conviction, a notice of appeal cannot extract a conviction from that judgment.

The failure on the part of the trial judge to clearly enter a conviction upon finding the appellant guilty of murder was a very serious irregularity, to say the least. It is an irregularity which must be corrected by our intervention by way of our revisional jurisdiction.

We next move on to the sole ground of appeal which the two learned counsel submitted on. Both Mr. Magongo and Mr. Marungu are on common ground that the trial judge did not address the assessors on voluntariness of the confessional statement and defence of alibi, which they both agree are vital points of law. They are also in agreement that failure to address the assessors on such vital points of law was a misdirection which vitiated the whole trial before the trial court. With due respect, the two learned counsel have correctly articulated the settled position of law regarding the trials in the High Court that are aided by the assessors. In the instant appeal there was a misdirection on the part of the trial judge for failing to direct the assessors on those two vital points of law.

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 judgments. From established authorities of the Court the vital points of law vary considerably, depending on particular facts tending to prove or disprove a vital point of law for the time being before the trial judge concerned. For example, in **Tulubuzya Bituro vs. Republic** (supra) the vital point of law was the issue of provocation. In **Charles Samson vs.**

Republic (supra) the vital point of law was alibi, and the trial High Court did not take cognizance of this defence in its summing up to the assessors and in the judgment.

In **Said Mshangama @ Senga vs. The Republic**, Criminal Appeal No. 8 of 2014 (unreported) the Court *suo motu* raised the issue whether or not, the assessors were adequately addressed particularly on the evidence of dying declaration which the Court regarded as a vital point of law in so far as this category of evidence require corroboration if the trial court has to ground a conviction thereon. The case of **Said Mshangama @ Senga vs. R**. stands out because the Court surveyed several decisions to reiterate a settled principle regarding the duty of the trial judge sitting with the aid of assessors to sum up adequately to the assessors on a vital point of law. Where the trial judge falls short of that duty, the resulting trial cannot be regarded to have been conducted with the aid of assessors as required by section 265 of the Criminal Procedure Act. The Court stated:

> *"...As provided under the law, a trial of murder before the High Court must be with the aid of assessors. One of the basic procedures is that the trial judge must adequately sum up to the said assessors before recording their opinions. Where there is inadequate summing up, non-direction or misdirection on such a vital point of law to assessors, it is deemed to be a trial without the aid of assessors and renders the trial a nullity. (See* ***Rashid Ally v. The Republic,*** *Criminal Appeal No.*

279 of 2010 – unreported). In Turubuzya ***Bituro v. The Republic*** *(1982) TLR 204, the Court held:-*

"Since we accept 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 non-direction to the assessors on a vital point ..."*** (Emphasis provided).

The list of decisions of the Court may go on, and on. But, the bottom line is the main unbroken thread of principle of law linking all these decisions is the requirement to address the assessors on any vital points of law disclosed in the individual case concerned and also to consider this point in their respective judgments.

We went further on to determine from the record of appeal whether or not, the three assessors were addressed by the trial judge on vital points of law alluded above. When we consulted the typed record of appeal and hand-written original record we found out that the summing up notes to assessors appearing on pages 15 to 17 of the typed record of appeal is missing from the original record of the trial court. We could not therefore verify whether or not the trial judge addressed the assessors on voluntariness of the confession and the defence of alibi. In addition, when we compared the opinions of assessors after the purported summing up, some portions of the opinion of the second assessor

(Hadija Lubudya) and that of the third assessor (Esther Masota) were missing from typed record of appeal but were fully reflected in the original record.

In light of the foregoing shortcomings, the best interests of justice shall not be served if we merely direct the trial judge to enter a conviction and pass appropriate sentence. As a way forward, we shall invoke the revisional powers of this Court under section 4 (2) of the Appellate Jurisdiction Act, Cap 141 (AJA) to quash and set aside the judgment of the trial court. We order the trial record to be remitted back to the High Court for a new trial to commence before another judge and different assessors. The appellant shall in the interlude remain in custody to wait for his trial. It is so ordered.

DATED at **MWANZA** this 4th day of June, 2015.

E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

K.M. MUSSA
JUSTICE OF APPEAL

I.H. JUMA
JUSTICE OF APPEAL

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

Z.A. Maruma
DEPUTY REGISTRAR
COURT OF APPPEAL