IN THE COURT OF APPEAL OF TANZANIA

AT ZANZIBAR

(CORAM: OTHMAN, C.J., KIMARO,J.A., And MUSSA,J.A.)

CRIMINAL APPEAL NO. 416 OF 2015

JUMA NEPO MAJALIWA ..... APPELLANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTION ..... RESPONDENT

(Appeal from the judgment of the High Court of Zanzibar at Vuga)

(Mahmoud,J.)

dated 20th March, 2015
in
Criminal Case No. 14 of 2009
.....

JUDGMENT OF THE COURT

10th & 14th December, 2015

KIMARO, J.A.:-

The appellant was convicted of the offence of manslaughter contrary to section 198 of Act No.6 of 2004 of the Laws of Zanzibar. It was alleged in the charge sheet that between 23rd January at or about 20.00 pm and 24th January, 2009 at or about 06.00 am at Kianga Branch in the Western District within the Urban West Region of Unguja the appellant murdered one PETRO MAHARAGE. He was sentenced to educational centre for life.

Aggrieved by the conviction and the sentence, the appellant filed a memorandum of appeal consisting of fourteen grounds of appeal. Mr. Rajab Abdallal Rajab, learned advocate assigned to represent the appellant filed a supplementary memorandum of appeal consisting of five grounds of appeal. The first two grounds faults the learned trial judge for an error in law. It is contended that she failed to properly sum up the case to the assessors on vital facts, evidence and applicable law, and that made the trial to be one which was not conducted with the aid of assessors. The second ground faults the learned judge for failure to make the assessors participate fully in the trial and that made the entire trial a nullity. The alternative grounds of appeal, three, four and five fault the learned trial judge for failing to make a proper assessment of the evidence, hence ending up in a wrong conviction of the appellant.

When the appeal came for hearing, Mr. Rajab Abdallah Rajab, learned advocate appeared for the appellant. The Director of Public Prosecution was represented by Mr. Ramadhani Nasib, Ms. Rashida Ahmed and Mr. Walid Mohamed, all learned Senior State Attorneys.

In arguing the appeal, the learned advocate for the appellant opted to proceed with the supplementary memorandum of appeal which he filed and abandoned the one filed by the appellant. He started with the first two

grounds of appeal which he argued simultaneously. The learned advocate said that section 238 of the Zanzibar Criminal Procedure Act, No.7 of 2004 requires all the trials in the High Court to be conducted with aid of assessors. The number of assessors should be three but in the subsequent proceedings the absence of one of the assessors of the set which started the trial will not affect the trial from proceeding. Section 278 (1) of the same act requires the trial judge to sum up the case to the assessors. He referred to the record of appeal at page 93 of the record of appeal and said the manner in which the learned trial judge made the summing up was not proper. He said although the record says that the learned judge read to the assessors what she had prepared as a summing up, what was read to the assessors is not reflected in the proceedings.

The learned advocate cited the cases of **Othman Issa Mdabe V Director of Public Prosecution** Criminal Appeal No. 95 of 2003 (unreported) and said that the failure by the learned trial judge to direct the assessors properly on the ingredients of the offence, the governing law the evidence that was given in the trial, that it was circumstantial evidence and the principles governing circumstantial evidence made the proceedings a nullity because the assessors were not in a position to render a proper verdict. The learned advocate added that apart from failure by the learned

trial judge to make a proper summing up to the assessors, she also failed to direct them properly in the conduct of the whole trial. He said the record of appeal shows that all the three assessors who sat with the learned judge were always present in court. However, the record of appeal at pages 45 and 55 show that they were not afforded an opportunity to put questions to the witnesses. He said section 266 of Act No. 7 of 2004 and 166 of the Evidence Decree Cap. 5 of the Laws of Zanzibar requires the trial judge to allow the assessors to put questions to the witnesses. He said the omission vitiated the trial because its effect amounted to the learned trial judge sitting alone while the law requires her to sit with assessors. He cited the case of **Abdallah Bazimiye and others V R** [1990] T.L.R. 42. He said since the proceedings were vitiated by noncompliance with the procedure of conducting the trial with assessors, the proceedings, conviction and sentence were a nullity. They should be quashed and set aside and the Court should order a fresh trial before another judge.

Submitting in support of the appeal, Mr. Walid, learned Senior State Attorney, agreed with the defects pointed out by the learned advocate for the appellant. He conceded that the summing up was not satisfactory as there was no summary of the evidence, relevant laws, and the defence of the appellant. He said the omission was fatal and its effect is that the learned

judge sat alone. He agreed with the decision of the Court in the case of **Othman Issa Mbade** (supra). He also cited the cases of **Jeremiah Paskal Gabriel V Director of Public Prosecution** Criminal Appeal No. 185 of 2012(unreported), **Bashiru Rashid Omar V S.M.Z** Criminal Appeal No. 83 of 2009 (unreported) and that of **Khamis Rashid Omar V Director of Public Prosecution** Criminal Appeal No. 284 of 2013(unreported). He said the cases reiterated the importance of an elaborative summing up. He prayed that the appeal be allowed because there is an apparent violation of the law.

After going through the record of appeal and having heard the submissions of the learned Senior State Attorneys and the learned advocate we must say, and with respect to the learned trial judge, that the trial was conducted in noncompliance of the provisions of the law governing trials with assessors. As correctly submitted, section 238 requires all the trials in the High Court to be with aid of assessors. In the case of **Othman Issa Mdabe** (supra) the Court held that although section 278(1) says that the Court **may sum up** the evidence to the assessors the rule of practice has always emphasized the importance of proper summing up to the assessors. The Court quoted with approval the case of **Abdallah Bazaniye and others V R** (supra) where the Court observed that:-

"...we think that assessors' full involvement as explained above is an essential part of the process that its omission is fatal, and it rendered the trial a nullity. We wish to add another thought to this exposition: For our purpose in the Court of Appeal, the informed and full views we have to rely on what we call the Segesela principle, that is in the event of the trial judge disagreeing with unanimous views of the assessors we shall want to determine whether he was entitled to do so. In order to enable us make that determination meaningfully we must know the judge's reasons for so disagreeing, and to appreciate those reasons we would have to gauge them against the full and informed views of the assessors which they can only express satisfactorily if the trial was with their aid as explained. This need for a judge to give his reason for disagreeing with the unanimous view as enunciated in ***Charles Segesela V R.,*** *E.A.C.A. Criminal Appeal No. 13 of 1973 a case tried in Tanzania, we wish to express our approval of it."*

In the same case the Court also cited the case of **Andrea s/o Kulanga and others v R** [1958] E.A. 684 where the Court held:-

> *"It is true that under s.283, sub-s. (1) of Tanganyika Criminal Procedure Code a trial judge is not under statutory obligation to sum up to the assessors. On this point we prefer the decision of this court in* ***Washington s/o Odunga V R*** *(1) (1954), 21 E.A.C.A. 392 following as it does the express words of s.283, to the dictum in* ***Mligwa s/o Mwinje and Another V R*** *(2) [1953] 20 E.A.C.A 255, 256, that s.283 (1) "requires the judge to sum up the evidence to the assessors". Nevertheless we wish to endorse the view expressed by this court in* ***Washington s/o Odingo*** *(1) that: it is very sound practice…to do so except in very simplest cases." The opinion of assessors can be of great value and assistance to trial judge, but only if they fully understand the facts of the case before them in relations to the relevant law. If the law is not explained and attention not drawn to the salient facts of the case, the value of the assessors's opinion is correspondingly reduced. The instant case was*

essentially one where the assessors should have the benefit of a carefully summing-up if any weight was to be attached to their opinion."

The Court dealt with the same issue in the case of **Rashid Omar V S,M.Z** (supra). In that case the Court held:

"The question we ask ourselves in this case is whether it was enough for a trial judge merely to state that section 278 (1) of the Criminal Procedure Act was complied with, without stating clearly having put it in writing in the record of proceedings the requirement of conducting summing up to the assessors. The trial Judge ought to have shown in the record the following:-

1. *The summary of the facts of the case.*
2. *The evidence adduced.*
3. *Explanation of the relevant law e.g. the ingredient of the offence, malice aforethought etc.*
4. *Any possible defence and of law regarding those defence."*

In the other case of **Khamisi Rashid Shaaban** (supra) also cited by the learned respective parties in this appeal, the Court cited with approval the case of **Jeremiah Paskal Gabriel** (supra) where the Court held that:-

> *"The words the Court may sum up to assessors" as used in section 279 (1) (supra) may sound discretionary but the 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."*

In this case all that the learned judge said in summing up to the assessors at page 93 of the record of appeal was:-

> *"Court has read the events of the case (what the witnesses has told the Court) but in brief to the assessors to give to this what their views on the case,"*

Obviously that is not what is envisaged in a summing up to assessors. No one can tell from the record what was read to the assessors and whether it reflected the offence the appellant was charged with, ingredients of the offence, the evidence that was led to support the charge and the defence of the appellant. In such a circumstance it was not possible for the assessors

to give any meaningful opinion. On the authorities already referred to, we are satisfied that the trial was a nullity.

In the case of **Bashiru Rashid Omar** (supra), the Court having been faced with the same predicament, it cited with approval the case of **Fatehali Manji V R** [1966] E.A. 343 and ordered a retrial because of the illegality of the trial. Using powers of revision conferred to the Court by section 4(2) of the Appellate Jurisdiction Act, CAP 141 R.E.2002 we quash the proceedings and set aside the conviction and sentence that was imposed on the appellant. We order a trial "*de novo*" before another judge with a different set of assessors.

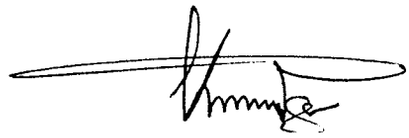
DATED at **ZANZIBAR** this 11th day of December, 2015

M. C. OTHMAN
CHIEF JUSTICE

N. P. KIMARO
JUSTICE OF APPEAL

K. M. MUSSA
JUSTICE OF APPEAL

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



J. R. KAHYOZA
REGISTRAR
COURT OF APPEAL