IN THE COURT OF APPEL OF TANZANIA

AT ZANZIBAR

(CORAM: KIMARO, J.A., MBAROUK, J.A., And MWARIJA, J.A.)

CRIMINAL APPEAL NO. 129 OF 2016

FADHIL YUSSUF HAMID.....APPELLANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS .....RESPONDENT

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

(Mahmoud, J.)

dates 16th March 2016
in
Criminal Case No. 1 of 2010
.....

JUDGMENT OF THE COURT

30th November & 6th December, 2016.

KIMARO, J.A.:

The appellant, Fadhil Yussuf Hamid was charged with two offences of murder contrary to sections 196 and 197 of the Penal Act, No. 6 of 2004. The two offences were alleged to have been committed on the same day, 21st day of February 2010. On 21st February, 2010 at about 10.30 hours at Mpasingozi Fundo Wete District, in the North Region of Pemba, the appellant was alleged to have with malice aforethought killed

Mwajuma Sahera Amir. At about 11.00 hours at the same place, the appellant was alleged to have with malice aforethought killed Yasrina Yussuf Fadhil. On the evidence that was adduced during the trial, the appellant was convicted with both offences and sentenced to suffer the death penalty by hanging for the first offence.

Aggrieved by the conviction and the sentence the appellant came to the Court with seven grounds of appeal in a substituted memorandum of appeal filed by Mr. Masoud Hamidu Rukazibwa, learned advocate on 17th November, 2016 to replace the one which was filed by the appellant personally on 10th August 2016.

When the appeal came for hearing on 30th November, 2016 the Director of Public Prosecutions who is the respondent in this appeal was represented by Mr. Suleiman Hamad Hassan learned Senior State Attorney as lead Attorney, assisted by Mr. Ramadhan Suleiman Ramadhan and Jina Mwinyi Waziri, both learned State Attorneys. Mr. Suleiman had, earlier, on 25th November, 2016 raised a preliminary objection to the effect:

"(a) *That the notice of appeal is incurably defective; hence it fails to comply with the Court of Appeal Rules.*

In the alternative

(b) *That, the purported memorandum of appeal is incurably defective; hence failure to comply with the Court of Appeal Rules.*

(c) That, the purported memorandum of appeal is incompetent for wanting of precision."

Mr. Masoud Hamidu Rukazibwa, learned advocate appeared for the appellant. Before the preliminary objection could be heard, the learned advocate for the appellant raised concern in respect of the rule relied upon by the learned Senior State Attorney to raise the preliminary objection. He said the decisions of the Court on improper citation of the law to move the Court are plenty. He said it was wrong for the learned Senior State Attorney to move the Court by citing Rule 4(2) (a) of the Court of Appeal Rules.

On our part we are of a considered view that we should not waste our time in deciding on this matter. What is before the Court is a criminal appeal. The notice of preliminary objection was filed by the respondent under Rule 4(2) (a) of the Court of Appeal Rules, 2009. It is a correct Rule for the nature of the preliminary objection raised by the appellant. For criminal appeals, the Court of Appeal Rules (the Rules) do not have a specific rule dealing with preliminary objections as it is the case for civil appeals. In Civil Appeals, Rule 107 (1) and (2) of the Rules specifically provides that:

> *"A respondent intending to rely upon preliminary objection to the hearing of the appeal shall give the appellant three clear days notice thereof before the hearing, setting out the grounds of objection such as specific law, principle or decision relied upon, and shall file five such copies of the notice with the Registrar within the same time and copies or photostat of the law or decision, as the case may be shall be attached to the notice."*

"If the respondent fails to comply with the Rule the Court may refuse to entertain the objection or may adjourn the hearing thereof upon such terms and orders as to costs and as it thinks fit."

Since there is no such Rule for criminal appeals, the respondent correctly invoked Rule 4(2)(a) to move the Court. Rule 4(1) of the Rules provides:

"The practice and procedure of the Court in connection with appeals,intended appeals and revision from the High Court, and the practice and the procedure of the Court in relation to review and reference; and the practice and the procedure of the High Court and tribunals in connections with appeals to the Court shall be as prescribed in these Rules or any other written law, but the Court may at any time, direct a departure from these Rules in any case in which this is required in the interest of justice."

On the other hand, Rule 4(2) (a) of the Rules which has been relied upon by the respondent in filing the preliminary objection provides:

> *"Where it is necessary to make an order for the purposes of dealing with any matter for which no provision is made by these Rules or any other written law; the Court may on application or on its own motion, give directions as to the procedure to be adopted or make any other order which it considers necessary."*

In as far as the respondents are concerned, the only Rule available for them under the Rules for raising the preliminary objection is 4(2)(a). The preliminary objection is properly raised by the respondent before the Court. If the preliminary objections were to be decided by the Court and found to have merit, that would have been sufficient to dispose of the appeal for the time being. See the case of **Director of Public Prosecutions V. Said Abdalla Kinyanyite and 11 others** Criminal Appeal No. 88 of 2015 (unreported). However, with a view of adherence to substantive justice as required by the Constitution of the United Republic of Tanzania article 107A 2(c) and other laws, and with a view of serving

time and costs for litigation, the Court noted a defect in the whole proceedings which was vital to be addressed.

Article 107A (2) (c) is couched in Kiswahili as follows:

"Katika kutoa uamuzi wa mashauri ya madai na jinai kwa kuzingatia sheria, Mahakama zitafuata kanuni zifuatazo, yaani- kutochelewesha haki bila msingi."

The defect we noted does not form part of the grounds of appeal raised by the appellant. The Court "*suo motu*" raised it and invited the learned State Attorneys representing the Director of Public Prosecutions and the learned advocate for the appellants to give their views on the matter.

The appellant as already indicated was charged with two offences of murder contrary to sections 196 and 197 of the Penal Act, No. 6 of 2004 (the Act).

Section 238 of the same Act provides that:

"All trials before the High Court shall be with aid of

assessors, the number of whom shall be three."

Sections 239 to 248 of the Act deal with preparation of list of assessors, persons suitable to serve as assessors, those who are exempted, publication, objections and the procedure for sorting out the objections, summoning of assessors, excuses from attendance and penalty for non-attendance. Section 263 of the same Act provides for selection of assessors before the sessions starts. The section reads:

> "*When the trial is to be held with aid of assessors, the court shall select three from the list of those summoned to serve as assessors at the sessions."*

The role of assessors as is apparent from the provisions of section 238 of the Act is to aid or in other words to assist the trial judge to make a fair decision in the trial. They are allowed to put questions. Section 266 of the Act says:

> "*The assessors may put any questions to the witnesses through or by the leave of the Judge, which the Judge himself might put and which he considers proper."*

The trial judge has a responsibility after the trial is concluded, to sum up the case to the assessors and require them to give their opinion on the case. Section 278 (1) of the Criminal Procedure Act, No.7 of 2004 provides as follows:

> *"When the case on both sides is closed, the Judge may sum up the evidence for the prosecution and the defense, and shall require each of the assessors to state his opinion orally, and shall record such opinion."*

The judge however, is not bound by the opinion of assessors but if he differs with them he has to give reasons. This is what the provision of section 278 (2) of the Act says:

> *"The judge shall then give judgment, but in doing so shall not be bound to conform to the opinions of the assessors."*

Responding to the question raised by the Court "suo moto" on whether the learned trial judge complied with the provisions related to the handling of the assessors during the trial, Mr. Masoud Hamidu Rukazibwa learned advocate informed the Court that he was the advocate for the

appellant in the trial court. He admitted that the learned trial judge did not comply with the provisions of the law dealing with handling of assessors during the trial. On his part Mr. Suleiman Hamed Hassan, learned Senior State Attorney was not hesitant to admit the mistake that was committed by the learned trial judge.

The perusal of the record of appeal from 24th May, 2012 when the file was placed for the first time before the learned trial judge after the Honourable Chief Justice assigned the same to her on 22nd May, 2012 shows that the learned trial judge did not comply with any of the provisions related to assessors. Mr. Masoud was appointed by the Honourable Chief Justice to defend the appellant on 13th June, 2012. The trial of the case started on 5th September, 2012. There is no indication on the record of appeal that there was selection of assessors. No name of assessor is disclosed. There is also no indication that their role was explained before the trial started. One cannot even say whether the appellant was given an opportunity to either accept them or give his reservations. At page 63 of the record of appeal the assessors were allowed to ask questions but all what is shown is recorded as follows:-

"Assessor No.1 and the answer the witness gave to the question that was asked.

Assessor No.3 and the answer the witness gave "

The same trend is repeated throughout the trial. There is not even a record to show that the learned trial judge complied with section 279(1) of the Criminal Procedure Act, No. 7 of 2004. The importance of compliance with the procedure for trial in aid of assessors has been explained in various cases decided by the Court. Among the authorities is the case of **Abdallah Bazamiye and others V. Republic** [1990] T.L.R 42. The Court held that:

"...We think that the assessors full involvement as explained above is an essential part of the process, that its omission is fatal, and renders the trial a nullity."

In as far as the proceedings are concerned, the learned trial judge must ensure that every direction given by the law must be shown to have been complied with and reflected in the proceedings. If for instance the provision of the section requiring selection of assessors is complied with, the record must reflect how it was complied with by disclosing the names

of the assessors selected and indicating who is the first assessor, second and third. The case of **Laurent Salu and five others V. R,** Criminal Appeal No. 176 of 1993 (unreported) is elaborative on all the steps which must be complied with in a trial with aid of assessors.

1) The Court must select assessors and give an accused person an opportunity to object to any of them.

2) The Court has to number the assessors, that is, to indicate who is number one, number two and number three, as the case may be.

3) The Court must carefully explain to the assessors the role they have to play in the trial and what the judge expects from them at the conclusion of the evidence.

4) The Court to avail the assessors with adequate opportunity to put questions to the witnesses and to record clearly the answers given to each one. If an assessor does not question any witness, that too, has to be clearly indicated as: "Assessor 2: Nil or no question.

5) The court has to sum up to the assessors at the end of submission by both sides. The summing up to contain a summary of facts, the evidence adduced, and also the explanation of the relevant law, for instance, what is malice aforethought. The court has to point out to the assessors any possible defences and explain to them the law regarding those defenses.

6) The court to require the individual opinion of each assessor and to record the same.

The case of **Bashiru Rashid Omar V. SMZ**, Criminal Appeal No. 83 of 2009 (unreported) gives same guidance on the procedure which the trial Judge must follow in a trial with aid of assessors.

On the aspect of summing up the case to the assessors, its necessity was underscored in the case of **Bharat V. The Queen** [1959] AC 533 in which the Court held that:

> "...where the assessors are misdirected on a vital point, such as provocation, the trial judge cannot be said to have been aided by those assessors."

The Court when dealing with the same issue of trial with aid of assessors on summing up held in the case of **Tulibuzya Bituro V. R** [1982] T.L.R. 264 that:

> *"Since we accept the principle in Bharat's case as being sensible and correct it must follow that in Criminal trial in the High Court where assessors are misdirected on a vital point, such a trial cannot be construed to be with the aid of assessors. The position would be the same where there is non-direction to the assessors on a vital point."*

In the case of **Bashir Rashid Omar** (supra) the Court held:

> *"The question we ask ourselves in this case is whether it was enough for the trial judge merely to state that section 278 (1) of the Criminal Procedure Act was compiled 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 ingredients of the of the offence, malice aforethought etc.*
4. *Any possible defense and the law regarding the defense."*

As already stated, the record of appeal shows that the learned trial judge did not record all what we have shown to be important for recording in as far as the assessors were concerned. With respect to the learned trial judge, the omission was fatal. The obvious thing which is apparent on the face of the proceedings is that there was a misdirection on the part of the learned trial judge in the whole trial.

The Court in the case of **Bernadetha Bura @ Lulu V. Republic,** Criminal Appeal No. 530 of 2015 (unreported) also dealt with the issue of trial with aid of assessors. After discussions on the provision of section 265 of the Criminal Procedure Act 1966 [CAP 20 R.E. 2002] which is "in pari materia" with section 238 of the Criminal Procedure Act No. 7 of Zanzibar, the Court held that it is couched in

mandatory terms. The Court advised that, section 265 uses the word "shall" meaning that it is mandatory to sit with assessors. On the other hand section 298(1) of Cap. 20 uses the word "*may*" which suggests that it is not mandatory to make a summing up to the assessors. However, a long established practice is that it is mandatory to make up a summing up to the assessors and there are a lot of cases decided to that effect by the Court. In order to make a meaningful sequence of sections 265 and 298(1), of Cap.20 the Court advised that section 298(1) should be amended and make it mandatory for the High Court Judges to sum up to the assessors. The rationale for giving that advise was:

> "the word "may" in its ordinary meaning connotes discretionary. But the Court had the occasion to say that though the word is discretionary, as a matter of long established principle practice, it is prudent for the trial judge to sum up the case. Indeed that augurs well with the spirit behind the provisions of section 265."

Reference was made to the cases of **Hatibu Ghandi & Others V. Republic** [1996] T.L.R. 12 and **Khamisi Nassoro Shomar V. S M Z** [2005] T.L.R. 228.

The Court went on to show the importance of reducing into writing what was summed up to the assessors. The Court held:-

> *"Be that as it may, in the instance case we have shown the learned trial judge indicated in the record that she summed up the case to the assessors. Since it is not on record, there is likelihood that she did so orally.*
>
> *In case she did that, we are not in a position to say what exactly she told the assessors. Did the learned judge sufficiently summed up the case to the assessors by explaining fully the facts of the case before them in relation to the relevant law? We cannot tell. We would have been in a position to answer that question only if the summing up was in writing. The summing up note in writing will enable this first appellate Court to see whether or not the trial judge sufficiently summed up*

the case to the assessors. Since that was not done, we are of a firm view that section 298(1) was not complied with. The trial cannot be said to have been with aid of assessors."

See also the cases of **Othman Issa Mdale V. Director of Public Prosecutions** Criminal Appeal No. 95 of 2013, **Khamis Rashid Shaaban V. Director of Public Prosecutions** Criminal Appeal No. 284 of 2013 and **Juma Nepo Majaliwa V. Director of Public Prosecution** Criminal Appeal No. 416 of 2015 (all unreported).

In this case the position is worse because of total non-compliance in the procedure for conducting trials with aid of assessors, that is from the time of their selection to the time of the summing up the evidence of the case to them, directing them on the issues that arose in the trial and the relevant law applicable. No names of assessors were disclosed throughout the trial, the appellant was not informed of the right he had on the assessors, role of assessors was not explained and there was no summing up. With respect to the learned judge, with such omission in compliance with the procedure, the proceedings are a nullity. The only remedy

reasonable and useful to make is to order a retrial which we hereby do, under the powers of revision conferred to the Court under section 4(2) of the Appellate Jurisdiction Act, [CAP 141 R.E. 2002].

Exercising powers of revision conferred upon us by section 4(2) of the Appellate Jurisdiction Act, [CAP 141 R.E. 2002] we declare the whole trial in Criminal Case No 01 of 2010 a nullity. We order a retrial before another judge. The assessors who participated in the trial with the learned judge should be replaced by others.

DATED at ZANZIBAR this 5th day of December, 2016.

N. P. KIMARO
JUSTICE OF APPEAL

M. S. MBAROUK
JUSTICE OF APPEAL

A. G. MWARIJA
JUSTICE OF APPEAL

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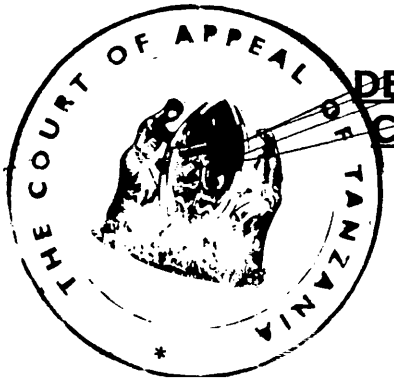

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