IN THE COURT OF APPEAL OF TANZANIA
AT ZANZIBAR

(CORAM: MBAROUK, J.A., MKUYE, J.A. And WAMBALI, J.A.)

CRIMINAL APPEAL NO. 496 of 2017

KHAMIS ABDUL WAHAB MAHMOUD.....APPELLANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

(Appeal from the Judgment of the High Court of Zanzibar, at Vuga)

(Rabia, J.)

dated the 27th day of February, 2015
in
Criminal Case No. 66 of 2008

JUDGMENT OF THE COURT

28th November & 6th December, 2018

MBAROUK, J.A.:

The appellant, Khamis Abdul Wahab Mahmoud was charged before the High Court of Zanzibar with the offence of murder contrary to section 196 and 197 of the Penal Act No 6 of 2004 of the Laws of Zanzibar. The trial Court convicted and sentenced him to suffer

death by hanging. Aggrieved, the appellant has preferred this appeal.

Briefly stated, the facts leading to this appeal are as follows: it was alleged that on 9th July 2008 at or about 23:30 hours at Magomeni in the Urban District within the Urban West Region of Unguja appellant murdered Mkubwa Juma Khamis. The prosecution's case purely based on a total of ten witnesses. In establishing the offence of murder against the appellant, the prosecution side relied on circumstantial evidence to prove of their case.

In this appeal, the appellant lodged his memorandum of appeal containing five ground of appeal. The grounds of appeal appeared as follows:-

1. *That, the honourable trial judge did error in law in failing to properly summing up and direct the*

assessors on vital points and applicable laws, hence the trial was conducted without the aid of assessors.

2. *That, the honourable trial judge did error in law in failing to consider the appellant's defence adduced during the trial, hence making the entire judgment and sentence a nullity.*
3. *That, the entire trial, proceedings and sentence are a nullity.*

ALTERNATIVELY

4. *That, the honourable trial judge did error in law and fact in convicting the appellant based upon weak evidence adduced before the court, and*

5. That, the honourable trial judge erred in law and in fact in holding that the charge of murder has been proved beyond reasonable doubt against the appellant.

The appearance in this appeal was that, Ms. Sabra Msellem Khamis, learned Principal State Attorney as a lead Attorney who was assisted by Mr. Omar Makungu and Mr. Shamsi Yasin Saad, learned State Attorneys represented the respondent/ Director of Public Prosecutions. On the other hand, Mr. Rajab Abdalla Rajab, learned advocate appeared for the appellant.

Earlier on, the respondent on 22/11/2018 filed a notice of preliminary objection to the following effect:-

"that, the purported appeal is incompetent since the relied record of proceedings is incompetent for

missing some important parts and grossly incorrect for being vague and containing misleading contents".

Ms. Sabra informed the Court that, the record of proceedings is incompetent for missing some important parts and containing misleading contents. For instance she started by pointing out that at page 14 of the record of appeal there was an order dated 12-11-2009 for assessors to be appointed as follows:-

"Order:

1. Mention on 14th December, 2009
2. Assessors to be appointed
3. Advocate for accused to be mentioned."

However, after the said order the record is silent if the assessors were appointed or not and again at page 15 shows that assessors

"**7/1/2010**

Coram: Omar O. Makungu, Judge

Ms. Sabra Mselem (S/A) for DPP.....Present

Mr. Masoud H. Rukazibwa (Advocate) for accused

.....Present

Accused Person:.....Present

Court Clerk .....Suleiman Said.

Assessors .....Present"

The court record shows that all assessors are present but there was no explanation about their names.

Again in page 32 of the record of appeal on 5/5/2011 the court Coram shows that:-

"Assessors No 1 Issa .....Present

Assessors No 2 .....Absent

Ms. Sabra pointed out that the record of appeal is silent as who is assessor No 2. She also pointed out that, the same irregularity of not mentioning the assessors names has been repeated and found at pages 33, 39, 44, 45,48, 49, 50, 51, 54, 55, 56, 60, 61, 63, 66 and 68 of the record of appeal. She added that in most of those pages assessors present are named by one name only which is not proper. She further pointed out that it is surprising that at page 85 of the record of appeal all three assessors were mentioned by their names such as Ali Abdallah, Ali Salim and Rukia Utope.

Another irregularity which Ms. Sabra pointed out was concerning the inconsistence of the number of the assessors. Throughout the proceedings the record shows that the number of assessors was three but on page 53 we see the number turn to be four assessors thus:-

"**30/4/2012**

Coram: Rabia H. Mohamed, Judge

S/A Sabra & Seleman Haji

Advocate Masoud for Accused

Accused Present

Court Clerk Mr Seleman

Assessors No 1-4 all present."

Having raised those anomalies, Ms. Sabra urged us to find that the trial judge erred procedurally. She then implored us to strike out the appeal for being incompetent and cited the case of **Director of Public Prosecutions versus Mohamed Hamza Mohamed,** Criminal Appeal No 572 of 2015 (unreported) in support of her submission.

On his part, Mr. Rajab, when responding to the preliminary objection he submitted that, the competence and incompetence of the record of appeal

is regulated under Rule 71 (2) (a-j) of the Tanzania Court of Appeal Rules, 2009. He admitted to all the irregularities pointed out by Ms. Sabra and submitted that the trial court did not record the presence of assessors properly. He, therefore, prayed for the Court to make necessary order for the interest of justice.

On our part, we agree with the submissions made by Ms. Sabra that, there are fatal irregularities in the record of appeal. For instance, the record is silent about the selection of assessors and whether or not the accused was given an opportunity to object to any of the assessors; also the trial court did not mention the three assessors by their full names. The record also shows that the trial court did not explain to the assessors their role they have to play in the trial and what the judge expected from them at the conclusion of the evidence of both sides.

Under normal circumstance, after the Court having found those irregularities, the proper procedure and remedy would have been to strike out the appeal for being incompetent. However, considering that each case is to be decided on its own facts and circumstances, and due to the seriousness of the offence in this matter, we have taken note of the inconsistencies and we have seen it prudent to link them with the merits of the first ground of appeal to reach to our conclusion for the interests of justices of both sides in this case.

As for the first ground of appeal, Mr. Rajabu learned advocate submitted that, the trial court failed to comply with the requirements of section 278(1) of the **Criminal Procedure Act** No 7 of 2004, which reads as follows:-

"when the case on both side is closed, the judge may sum up the evidence for the prosecution and the defence, and shall then require each of the assessors to state his opinion orally, and shall record such opinion".

He submitted that the learned trial Judge did not properly sum up to assessors by directing them to the vital point of laws such as ingredient of murder, malice aforethought, identification, circumstantial evidence and causation. He submitted that, the aim of summing -up the vital points of law to assessors is to assist the trial court in arriving at a just decision. He referred us to the case of **Khamis Rashid Shaaban versus Director of Public Prosecutions,** Criminal Appeal No 284 of 2013, (unreported).

Mr. Rajab further submitted that, failure to sum up to assessors properly is fatal and cannot be said that the trial was conducted with the aid of assessors. He then urged us to invoke revisional powers conferred upon us under section 4(2) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2002 and quash the proceedings, set aside the sentence and the case to be remitted to the High Court for retrial before another judge and a new set of assessors.

It is clear that, in all criminal trials the High Court is required to conduct such trials with the aid of assessors. Indeed, assessors are very helpful in the conduct of such trials only when they are properly informed and directed. At the end of the trial, the court is required to sum up the evidence to assessors as provided under section 278(1) of the Criminal Procedure Act No. 7 of 2004.

Though the wording of the section appears discretionary but the practice has always been that the judge has to sum up the evidence to the assessors on all essential elements of the offence. Such was the Court's position in the case of **Mulokozi Anatory versus Republic,** Criminal Appeal No. 124 of 2014 (unreported) where it was stated that:-

> *"...we wish first to say in passing that though the word "may" is used implying it is not mandatory for the trial judge to sum up the case to the assessors but as a matter of long established practice and to give effect to S. 265 of the Criminal Procedure Act that all trials before the High Court shall be with aid of assessors, trial judges sitting with assessors have invariably been summing up the cases to the assessors..."*

In the case of **Abdallah Bazaniye and others versus Republic**, [1990] TLR 42, this Court observed that:-

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

It is evident that the trial judge is duty bound to adequately direct the assessors to all vital points of law disclosed in the case upon which the decision will be based on, so as to enable assessors to give meaningful opinions. See the cases of **Masolwa Salum versus Republic**. Criminal Appeal No. 206 of 2014, **Said Mshangama @ Senga versus Republic**. Criminal Appeal No. 8 of 2014, **Fadhili Juma and another versus Republic,** Criminal Appeal No 567 of 2015,

Othman Issa Mbade versus Director of Public Prosecutions, Criminal Appeal No 95 of 2013 and **Augustino Lodaru versus Republic,** Criminal Appeal No 70 of 2010 (all unreported).

All those authorities have emphasized the importance of summing up to assessors. Having laid down the legal foundation on the issue of summing up to assessors, we now proceed to consider the sufficiency or otherwise of the summing up in the present case.

We, indeed, consider the summing up done to assessors as not proper and insufficient on vital points of law. What the Honourable Judge did when summing up to assessors, as seen at pages 81-85 of the record of appeal was only to summarize evidence from both sides and later summed up to them on the malice aforethought and circumstantial evidence without

elaborating further. Having so done, the Honourable trial Judge called upon the assessors to give their opinions which is not sufficient.

As per the record of appeal, the learned trial Judge, has nowhere in his summing up to assessors explained and elaborated to them the ingredients of the malice aforethought and whether the appellant killed the deceased with malice aforethought. Also, the issue of identification of the appellant was never summed up to the assessors. Furthermore, the case before trial court was purely based on circumstantial evidence but the trial court only defined what is circumstantial and nothing more was explained to assessors. The deficiencies we have endeavored to demonstrate above have the effect that the assessors were not completely and sufficiently directed on vital points of law on which the case was decided.

In yet another case of **Tulubuzwa Bituro versus Republic** [1982] TLR 264 the Court categorically stated 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..."*

Given the deficiencies in the summing up to the assessors which featured in the present case and the import of the relevant law and the Court decisions, we are satisfied that the trial cannot be said to have been conducted with aid of assessors and the infraction vitiated the trial. We accordingly invoke our powers of revision under section 4(2) of the Appellate Jurisdiction

Act, Cap. 141 R.E. 2002 and hereby quash all the proceedings and judgment of the trial court and set aside the sentence meted out to the appellant and we order the case to be tried de novo before another judge and another set of assessors. It is so ordered.

DATED at **ZANZIBAR** this 4th day of December, 2018.

M. S. MBAROUK
JUSTICE OF APPEAL

R. K. MKUYE
JUSTICE OF APPEAL

F. L. K. WAMBALI
JUSTICE OF APPEAL

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

B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL