IN THE COURT OF APPEAL OF TANZANIA
AT MBEYA

(CORAM: JUMA, C.J., MZIRAY, J.A. And MWAMBEGELE,J.A.)

CRIMINAL APPEAL NO 327 OF 2017

SHIJA S/O SOSOMA.....APPELLANT

VERSUS

D.P.P.....RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Mpanda)

(Hon. Mambi, J.)

dated the 3rd day of August, 2017
in
Criminal Sessions Case No. 18 of 2016

JUDGMENT OF THE COURT

05th & 7th November, 2019
JUMA, C.J.:

The appellant SHIJA S/O SOSOMA, was in the High Court sitting at Mpanda charged with the offence of murder contrary to section 196 of the Penal Code Cap 16 R.E. 2002. He was alleged to have murdered his elder wife, NG'WASHI d/o NKUBA on the 23rd January 2012. After hearing the evidence from four prosecution witnesses, and also the appellant's defence; the trial High Court convicted him of murder and sentenced him to suffer death by hanging.

The appellant was aggrieved with his conviction and therefore filed this appeal. Accordingly, at the hearing of this appeal on 5th November, 2019, the Respondent Director of Public Prosecutions was represented by two learned counsel, Ms. Scholastica A. Lugongo, learned Senior State Attorney and Mr. John M. Kabengula, learned State Attorney. The appellant was represented by Mr. Justinian Mushokorwa, learned Advocate.

When he rose to address the Court, Mr. Mushokorwa informed the Court that he and Ms. Lugongo have identified preliminary matters of law which touch on propriety of this appeal, which the learned counsel would like us to address before we go into the merits of the grounds of appeal. Ms. Lugongo drew our attention to several irregularities which in her reckoning, either singly or cumulatively, vitiate the entire proceedings before the trial High Court.

On the **first** irregularity, Ms. Lugongo referred us to page 10 of the record of appeal where, names of three assessors are recorded. She submitted that recording of the names of assessors does not go so far as to show that the appellant was given the opportunity to express if he had any objections against the participation of any or all of the three assessors.

As for consequence which befall the failure to ask the appellant if he had any objections against the assessors, Ms. Lugongo urged us to follow a decision of this Court in **CHACHA MATIKO @ MAGIGE V. R.,** Criminal Appeal No. 562 of 2015 (unreported) where the trial court was faulted for failing to give the appellant the opportunity to express whether or not he objected to the selected assessors or any of them. The learned counsel had argued that failure to give the appellant this opportunity, meant that the trial was a nullity for failure to be conducted with the aid of assessors. The Court in **CHACHA MATIKO @ MAGIGE** followed its previous decision in **LAURENT SALU & 5 OTHERS V. R.,** Criminal Appeal No. 176 OF 1993 (unreported) to state: *"...the omission by the trial court, to afford the appellant an opportunity to express whether or not he objects to any of the assessors, certainly prejudiced the appellant as well as the prosecution."*

Ms. Lugongo cemented her stance by referring us to another decision in **ANDREA BERNADO & CHARLES MICHAEL V. R.**, Criminal Appeal No. 128 of 2015 (unreported) where the Court described the failure by the trial court to afford the appellants the opportunity to air their views on the selected assessors to be troubling. This failure, the Court concluded, abrogated the appellant's right to a fair hearing. Ms. Lugongo submitted

that the Court in **ANDREA BERNADO** (supra) referred to a passage in **LAURENT SALU AND 5 OTHERS** (supra) which reiterated the duty of trial courts to give accused persons opportunity to express objections against any of the assessors is an established rule of practice which is an integral part of fair hearing:

> *"In the instant case, it is not known if any accused persons had any objection to any of the assessors, and to the extent that they were not given the opportunity to exercise that right, that clearly amounted to an irregularity."*

Moving onto the **second** irregularity, the learned Senior State Attorney referred us to the same page 10 of the record of appeal and submitted that the charge of murder was not read out and explained to the appellant when the trial court sat on 20th July, 2017 to hear the first of the four prosecution witnesses. She submitted further that although the appellant's plea was taken on 2nd May, 2017 by Mgetta, J. during the Preliminary Hearing as evidenced on page 5 of the record of appeal; still, the trial Judge was required to record the appellant's plea before the start of the main trial on 20th July, 2017.

For the **third** set of irregularities Ms. Lugongo, urged us to look at the trial Judge's summing up notes. She submitted that the trial Judge committed the irregularity of including in his summing-up notes, matters which were extraneous to the record of proceedings and did not originate from evidence of witnesses. Specifically, she referred us to page 35 of the record of appeal where the trial Judge told the assessors that a witness, PWIII-MAHAILA S/O NDOLAGE had testified before the trial court. But this fact is not borne out of evidence of witnesses, she submitted. Ms. Lugongo pointed out to us that there was no witness who testified under the name PWIII-MAHAILA S/O NDOLAGE. Instead, she added, it was PAULO NKUBA (PW3) who testified as the third prosecution witness. The learned Senior State Attorney did not know where the trial Judge obtained this witness.

In face of all the above irregularities, the learned Senior State Attorney submitted, the propriety of the entire proceedings leading up to this appeal is questionable. She urged us to invoke our power of revision under section 4(2) of the Appellate Jurisdiction Act, Cap 141 (the AJA) to quash the entire proceedings before the High Court and order a fresh trial by another trial Judge and a different set of assessors.

When we prodded her with the question whether, despite the irregularities, this appeal can still be saved by the principle of Overriding Objective under sections 3A and 3B of the AJA; Ms. Lugongo robustly pushed back and insisted that the irregularities in the proceedings are so fundamental that they infringe the very substantive justice which the provisions of overriding objective were enacted to support. She argued that there cannot be any semblance of trial in the High Court with the aid of assessors under section 298 of the Criminal Procedure Act, Cap. 20 R.E. 2002 (the CPA) where summing up notes include matters extraneous to the evidence on record. But in so far as the learned Senior State Attorney was concerned, there can only be a trial by assessors where their opinions are based on correct facts, which in the proceedings of the trial court, are missing.

In reply, Mr. Mushokorwa, the learned counsel for the appellant had little to say other than to support what the learned Senior State Attorney had submitted on. He expressed his position that these irregularities go to the root of his fair trial, which the appellant was denied. Like Ms. Lugongo, he urged us to invoke the revision jurisdiction of the Court and order a fresh trial before another Judge and another set of assessors.

Now, it is appropriate to address the substance of the irregularities highlighted by the two learned counsel.

With regard to the opportunity to voice objection against a choice of assessors, Ms. Lugongo cited several authorities of this Court including **CHACHA MATIKO @ MAGIGE** (supra), **ANDREA BERNADO** (supra) and **LAURENT SALU** (supra) wherein the Court has invariably underscored the importance of according an appellant opportunity to object the participation of either all the selected assessors, or against any one of them, in his trial. We associate ourselves with mentioned authorities of the Court which should have guided the proceedings of the trial High Court leading up to this appeal.

The record of appeal before us is very clear that the charge of murder was not read to the appellant and his plea was not taken before the prosecution presented its first witness on 20th July 2017. For criminal trials in the subordinate courts there is plethora of authorities restating that failure to state the substance of the charge to the accused person and the failure to ask the accused whether he admits or denies the truth of the charge, is fatal to the prosecution's case under the mandatory

wordings of section 228 (1) of the CPA: see **FRANK S/O MGALA & 2 OTHERS V. R.**, Criminal Appeal No. 364 OF 2015 (unreported).

Section 228 (1) of the CPA provides:

> ***"228.*** *-(1) The substance of the charge shall be stated to the accused person by the court, and he shall be asked whether he admits or denies the truth of the charge."*

Taking of pleas for trials conducted in the High Court falls under PART VIII of the CPA. Section 275 which is under Part VIII of the CPA provides for the initiation of trials before the High Court:

> *"275.-(1) The accused person to be tried before the High Court upon an information shall be placed at the bar unfettered, unless the court shall see cause otherwise to order, and the information shall be read over to him by the Registrar or other officer of the court, and explained, if need be, by that officer or interpreted by the interpreter of the court and he shall be required to plead instantly thereto, unless, where the accused person is entitled to service of a copy of the information, he objects to the want of such service, and the court*

shall find that he has not been duly served therewith.

(2) After the accused has pleaded to the charge read to him in court under this section, the court shall obtain from him his permanent address and shall record and keep it."

In our view, the duty to take and record the appellant's plea immediately before trial begins in the High Court is provided for under section 283 which also falls under PART VIII of the CPA:

"283. If the accused person pleads "not guilty" or if the plea of "not guilty" is entered in accordance with the provisions of section 281, the court shall proceed to choose assessors, as provided in section 285, and to try the case." [Emphasis added].

Our reading of section 283 makes it plain to us, that it is a PLEA OF NOT GUILTY that triggers the selection or choosing of the assessors under section 285. But the record of appeal on page 10 does not show whether the appellant PLEADED NOT GUILTY:

*"**Date:** 20.07.2017*

Coram: *Hon. Dr. A.J. Mambi, Judge.*

For Republic: *Gregory Mhangwa, State Attorney*

Accused: *Present*

Interpreter: *Miss Zuhura Jabir—English into Kiswahili and vice versa*

Miss Margreth Kannonyele*—Judge's Legal Assistant*

Information is read over and properly explained to the accused person in Kiswahiii language.

Court Assessors: -

1. *Augustino Kasamya*
2. *Mathias Kalyagi*
3. *Benezeth Kilalu*

Prosecution: *My Lord, I am Gregory, the State Attorney for the Republic. We also have Mr. Elias Kifunda for the Defence.*

Defence: *We are ready.*

Prosecution: *We pray to call the first witness (PW1)."*

Further, the record confirms the learned counsel's concern that the trial Judge did not record a plea of NOT GUILTY as envisaged under section 283, rendering the subsequent trial a nullity.

On the issue of contents of the summing-up notes of the trial Judge, our reading of the record of appeal bears out Ms. Lugongo's assertion that

indeed the trial Judge's summing up to assessors contains matters beyond what witnesses actually testified on.

The trial Judge's summing up on pages 33 and 34 includes matters of fact which were not borne out of the evidence of witnesses on record. The first example is where the trial Judge informed the assessors that the prosecution relied on five witnesses. But, the record of appeal shows otherwise because, only four prosecution witnesses: Liganga Masengi (PW1), Mtokwa Jabu (PW2), Paulo Nkuba (PW3), and D/CPL Lohana (PW4)—testified. **Secondly**, the trial Judge informed the assessors that defence had two witnesses, whereas the record of appeal shows that only the appellant Shija s/o Sosoma testified as DW1 in his own defence. **Thirdly,** the summing up notes shows that what the appellant (DW1) testified on in his defence is starkly different from what is actually recorded as DW1's evidence. In the summing up, the trial Judge incorrectly stated:

> *"DW1 said that on 12.3.2015, he remembers that he was at his home with at his wife and children at Chambalendi until night. He said that he slept with his wife and their young child called Kanwa who had three years. DW1 testified that while sleeping he saw someone pulling our bed sheet through the*

window. He said that strange person told him to keep and he was slapped with a panga. DW1 said that he saw someone cutting his wife's neck with the 'panga'. DW1 told the court that they were invaded by unknown persons whose faces were hidden and disappeared later. DW1 said that he woke up his children and called his brother in law Mahela but he feared. DW1 further said he was horrified and decided to run away to the shamba to hide in fear of attack from the bandits."

But, on pages 21 and 22 the appellant, DW1, actually stated:

*"**XD—Defence: -***

I had two wives one died. The remaining is Yunge Sita. The first wife namely Ngwashi Nkuba. I remember on 22.01.2012 I was at home at my young wife at Mawiti. I spent the night there. On 23.01.2012 I went to my first wife (the deceased) and found she is dead. I reported the matter to Mtogwa who was the ten-cell leader. We went to my house where the deceased body was lying. Many people gathered. Watu wote walinigeuzia kibao kwamba mimi ndiyo nimeua (all people were against me, saying I was the killer).

I was sent to police; PW1, PW2 and PW3 were lying. At the police, I denied my charges. I pray the court to discharge me.

> ***XXD—State Attorney:*** *- I have been at Mawiti for a very long time. I had good relation with my neighbours. I have nine kids. My child died of normal disease."*

It is clear from above, what the trial Judge summed up to the assessors about what DW1 testified on, was not what the appellant (DW1) actually stated in his evidence appearing in the record of appeal. In **KULWA MISANGU V. R.,** Criminal Appeal No. 171 OF 2015 (unreported) [Citing **WASHINGTON S/O ODINDO V. R.**, (1954) 21 EACA 392] the Court stated that the import of summing-up to the assessors under section 298 (1) of the CPA means to accurately summarize the evidence from the parties in order to enable the assessors to understand the accurate facts of the case. Section 298 (1) states:

> *298.-(1) When the case on both sides 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 as to the case generally and as to any specific question of fact addressed to him by the judge, and record the opinion.*

Summing up the evidence under section 298 (1) of the CPA envisages evidence of witnesses as accurately recorded by the trial Judge. We think, opinions of assessors will only be useful to the trial High Court if these opinions are based on a true and accurate account of what the witnesses actually said in court.

This Court, in an occasion presented in the case of **ATHANAS JULIAS V. R.,** CRIMINAL APPEAL NO. 498 OF 2015 (unreported), in essence warned trial courts not to include in their judgments, facts which are not reflected in the recorded evidence in the proceedings. The Court described it to be an incurable anomaly:

> *"...the act of the trial resident magistrate to include in his judgment, facts which are not reflected in the recorded evidence in the proceedings. The implication here is that, either, in his judgment, the trial resident magistrate did include extraneous matters which did not completely feature in the evidence of the witnesses who were called to testify, or, the trial resident magistrate did omit to record a number of facts that were said by the witnesses in their testimony. In either case, we are inclined to join hands with the contention of the*

learned counsel for both sides that, the irregularity occasioned was fatal and did vitiate the entire proceedings of the trial court."

We agree with Ms. Lugongo that the principle of overriding objective now part of our laws, cannot save this appeal with its present irregularities. The learned Senior State Attorney is correct to contend that if these irregularities are left standing; they will defeat the core pillar of "JUST RESOLUTION" of appeal provided for under the principle of overriding objective. The overriding objective sections 3A and 3B of the AJA reiterate the words *"just, expeditious, proportionate and affordable resolution"* in the following way:

"3A.-(1) The overriding objective of this Act shall be to facilitate the <u>just</u>, <u>expeditious</u>, <u>proportionate</u> and <u>affordable resolution</u> of all matters governed by this Act." [Emphasis added]

We think, inasmuch as expeditious processing of present appeal is one of the pillars of the principle of overriding objective, expeditiousness must not come at the expense of JUST RESOLUTION/ JUST DETERMINATION OF APPEAL. Section 3B of the AJA equally ranks JUST

RESOLUTION/ JUST DETERMINATION very highly: *"(a) just determination of the proceedings."* In our view, this pillar of JUST RESOLUTION/ DETERMINATION is ranked higher than "expeditiousness" because just resolution of disputes is a constitutional construct, wherein courts in Tanzania are obliged to do justice, that is to get at the truth as to what really happened, so to speak. For purposes of this appeal, "just determination" means acquitting the innocent and convicting the guilty. As correctly submitted by Ms. Lugongo; the irregularities in this appeal, prevents this Court from getting at the truth of what happened on 23/01/2012 at Kabunde area of Mpanda district when Ng'washi d/o Nkuba was found dead in a pool of blood. We can only get the truth through a fresh trial to be conducted in accordance with the applicable procedure.

In the circumstances, the irregularities we have outlined call for our intervention by way of revision under section 4(2) of the Appellate Jurisdiction Act, Cap. 141.

As a result, we quash all the proceedings of the trial court from the stage when the assessors were selected, and set aside the conviction and sentence of death. For the avoidance of doubt the Preliminary Hearing

which was conducted by Mgetta, J. on 02/05/2017 shall not be affected by this decision. Otherwise we order the appellant to remain in prison remand to wait for the main trial before a different trial Judge with a different set of assessors.

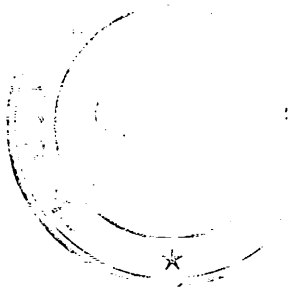
DATED at **MBEYA** this 7th day of November 2019.

I. H. JUMA
CHIEF JUSTICE

R.E.S. MZIRAY
JUSTICE OF APPEAL

J.C.M. MWAMBEGELE
JUSTICE OF APPEAL

The Judgment delivered this 7th day of November, 2019 in the presence of Mr. John Kabengula, holding brief for Mr. Justinian Mushokorwa, counsel for the Appellant who is also present and Mr. John Kabengula, learned State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.



A. H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL