IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

(CORAM: JUMA, C.J, MKUYE, J.A AND MWAMBEGELE, J.A.)

CRIMINAL APPEAL NO. 329 OF 2017

YUSTINE ROBERT ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Sumbawanga)

(Mambi, J.)

dated the 4th day of August, 2017
in
Criminal Sessions Case No 13 of 2016

JUDGMENT OF THE COURT

6th & 8th November, 2019

MWAMBEGELE, J. A.:

The High Court of Tanzania sitting at Sumbawanga convicted the appellant Yustine Robert of murder contrary to section 196 of the Penal Code, Cap. 16 of the Revised Edition, 2002. It was alleged that on 05.04.2013, at Majimoto Village in Mlele District, Katavi Region, he murdered Frank Yustine, Elizabeth Yustine and Jacklina Lwiche. He was awarded the mandatory sentence of death by hanging. Aggrieved, he lodged this appeal complaining his innocence.

The appeal was argued before us on 06.11.2019 during which the appellant appeared and was represented by Mr. Mika Mbise, learned advocate. Ms. Scholastica Lugongo, learned Senior State Attorney and Ms. Irene Mwabeza, learned State Attorney, joined forces to represent the respondent Republic. Mr. Mbise had earlier lodged written submissions in support of the appeal. However, for reasons that will become apparent in the course of this judgment, we will direct ourselves to the submissions in relation to the sixth ground; a complaint on the shortcoming to the effect that the court imported extraneous matters in the record of appeal. We will also determine the appeal basing on other ailments discussed during the trial.

Together with the shortcoming raised above, at our prompting, the learned counsel for the appellant addressed us on others as well; that is, failure by the trial court to accord the appellant the opportunity to express whether or not he objected to the selected assessors, circumstantial evidence used to convict the appellant but no summing up to assessors was done on it, the accused's plea was not taken, assessors gave their opinion before summing up, and sentence.

Submitting on the first complaint; the subject of the sixth ground of appeal, Mr. Mbise, in the written submissions earlier filed, submitted that in the Judgment of the High Court, there are facts stated therein which are not at all found in the record of proceedings. The learned counsel for the appellant gave examples of those areas but we particularly prompted him to submit on what appears at p. 66 of the record of appeal. The learned counsel submitted that the contents at that page did not depict what transpired in the case. He added that reference to the accused as Shija Sosoma, was but a misnomer.

Regarding failure by the trial court to give the appellant the opportunity to say whether or not he objected to the selected assessors, Mr. Mbise submitted that, that was a fatal ailment. He added that it is the practice of the High Court that before commencement of the trial an accused person must be asked whether or not he has any objection to all or any one of the selected assessors.

Responding to the probing by the Court on the fact that circumstantial evidence was highly relied upon to convict the appellant but the same is not featuring in the summing up to assessors, Mr. Mbise submitted that the

course of action offended the justice of the case. It was as if the trial was conducted without the assessors thereby offending the dictates of section 265 of the Criminal Procedure Act, Cap. 20 of the Revised Edition, 2002 (the CPA), he submitted.

Submitting on the failure by the Court to take the appellant's plea before commencement of trial, Mr. Mbise submitted that that was yet another ailment. He added that at p. 19 of the record of appeal the trial court recorded that the appellant was "reminded his charges" but nothing is shown on what was his plea. That aliment also offended the justice of the case.

Prompted on assessors giving their opinion before summing up, Mr. Mbise submitted that the shortcoming adds up to other raised irregularities in the proceedings of the case.

With regard to sentence, Mr. Mbise submitted that it was omnibus, for it was not clear as to which count the appellant was convicted on. He added that the appellant ought to have convicted on only one count.

In view of the above shortcomings, Mr. Mbise prayed that the appellant should be set free as a retrial will not meet the justice of the case.

He implored us to use the principles in ordering a retrial as enunciated in **Fatehali Manji v. Republic** [1966] 1 EA 343.

The respondent Republic, through Ms. Lugongo, was at one with Mr. Mbise on all the ailments raised. She beefed up the submissions by citing to us **Chacha Matiko @ Magige v. Republic**, Criminal Appeal No. 562 of 2015 (unreported) in which, relying on its previous decision in **Laurent Salu v. Republic**, Criminal Appeal No. 176 of 1993 (also unreported), the Court nullified the proceedings of the case because of failure by the trial court to give an opportunity to the accused to comment on whether or not he had any objection to the selected assessors. The learned Senior State Attorney also cited to us **Andrea Bernado and Another v. Republic**, Criminal Appeal No. 128 of 2015 (unreported) which followed the stance taken in **Laurent Salu** (supra).

With regard to other ailments, the learned Senior State Attorney joined hands with the learned counsel for the appellant. She had nothing useful to add. She, however, parted ways with him on the way forward. To her, this was a serious homicide case involving murders of three people, it was

therefore in the interest of justice that the Court orders a retrial like it did in **Chacha Matiko @ Magige** (supra).

In his short rejoinder, Mr. Mbise reiterated the prayer to set his client free. He argued that **Fatehali Manji** (supra) was the appropriate authority to be used in the circumstance of this case; not **Chacha Matiko @ Magige**.

Having summarized the submissions of the parties on the ailments in the proceedings of case, we should now be in a position to determine them. In our determination, we will deal with the irregularities as argued by Mr. Mbise. We will thus first address the complaint relating to the trial court importing extraneous matters in the case. Both trained minds for the parties are at one that this was a fatal ailment. As good luck would have it, this is not the first time we are grappling with this issue. We dealt with it in **Apolinary Matheo and 2 Others v. Republic**, Criminal Appeal No. 436 of 2016 (unreported), apparently, a case emanating from the same High Court Registry. The ailments in that case; that is **Apolinary Matheo**, fall in all fours with the ailments in the present case. We shall, therefore, whenever necessary reiterate the position we took in **Apolinary Matheo**.

We are in agreement with Mr. Mbise that the record of appeal contains some extraneous matters. We have scanned through the proceedings. Having so done, we respectfully think Mr. Mbise is right. At p. 66 the learned Judge refers to the accused person as Shija Sosoma. This is not correct and what is said to have been testified by him in defence was not actually testified by the appellant. In **Okethi Okale and Others v. Republic** [1965] 1 EA 555, the erstwhile Court of Appeal for East Africa, underscored the importance of not importing extraneous matters into evidence, in the following terms:

> *"In every criminal trial a conviction can only be based on the weight of the actual evidence adduced and it is dangerous and inadvisable for a trial judge to put forward a theory not canvassed in evidence or in counsel's speeches".*

Next for determination is the ailment respecting failure by the trial court to accord the appellant the opportunity to express whether or not he objected to all or any of the selected assessors. As we stated in **Apolinary Matheo** (supra) the statement of principle was meticulously articulated in **Laurent Salu and five others v. Republic,** Criminal Appeal No. 176 of 1993 (unreported) thus:

"Admittedly the requirement to give the accused the opportunity to say whether or not he objects to any of the assessors is not a rule of law. It is a rule of practice which, however, is now well established and accepted as part of the procedure in the proper administration of criminal justice in this country. The rationale for the rule is fairly apparent. The rule is designed to ensure that the accused person has a fair hearing. For instance/ the accused person in a given case may have a good reason for thinking that a certain assessor may not deal with this case fairly and justly because of, say, a grudge, misunderstanding, dispute or other personal differences that exist between him and the assessor. In such circumstances in order to ensure impartiality and fair play it is imperative that the particular assessor does not proceed to hear the case; if he does then, in the eyes of the accused person at least, justice will not be seen to be done. But the accused person, being a layman in the majority of cases, may not know of his right to object to an assessor. Thus in order to ensure a fair trial and to make the accused person have confidence that he is having a fair trial, it is of vital importance that he is

informed of the existence of this right. The duty to so inform him is on the trial judge, but if the judge overlooks this, counsel who are the officers of the court have equally a duty to remind him of it.

In the instant case, it is not known if any of the 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 amounts to an irregularity."

In the case at hand, the trial court omitted this elementary principle in the administration of criminal justice. In the light of the just cited excerpt, the irregularity is fatal – see also: **Tongeni Naata v. Republic** [1991] TLR 54 and **Yohana Mussa Makubi and Another v. Republic**, Criminal Appeal No. 556 of 2015, **Hilda Innocent v. Republic**, Criminal Appeal No. 181 of 2017, and **Fadhil Yussuf Hamid v. Director of Public Prosecutions**, Criminal Appeal No. 129 of 2016.

The position was meticulously summarized in **Fadhil Yussuf Hamid** (supra) as follows:

*"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."

[See also: **Bashiru Rashid Omar v. SMZ,** Criminal Appeal No. 83 of 2009 (unreported)]

In the case at hand, it is not shown anywhere that the appellants were given an opportunity to object or not to object to all or any of the assessors. That course offended the very first principle in **Laurent Salu** (supra) as summarized in **Bashiru Rashid Omar** (supra) that the Court must select assessors and give an accused person an opportunity to object or not to object to all of any of them. That omission vitiated the proceeding of the High Court from the date of its noncompliance.

Next for determination is about failure by the trial court to arraign the appellant. The record is clear at p. 19 that the appellant was reminded of the charges levelled against him. However, it is silent as to the plea by the appellant. It shows that after the charges were read over to the appellant, the first witness, Edwin Nkolo (PW1) proceeded to testify. That was a fatal

irregularity. It was incumbent upon the court to take and record the appellant's plea before proceeding into the trial. The course taken by the court offended section 275 (1) of the CPA. The subsection provides:

> *"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."*
>
> [Emphasis added].

The subsection reproduced above is couched in imperative terms. Failure to comply with it is an incurable irregularity. The High Court (Davies, Chief Justice), in **Akbarali Walimohamed Damji v. Republic**, 2 TLR 137 once observed:

"The arraignment of an accused is not complete until he has pleaded. ***Where no plea is taken the trial is a nullity.*** *The omission is not an irregularity which can be cured by section 346 of the Criminal Procedure Code [now section 388 of the CPA]".*

[Emphasis ours].

The position taken in **Akbarali Walimohamed Damji** was restated by the High Court in **Republic v. Venance Ndali** [1977] LRT n. 44 in which the court (Sisya, Ag. J. – as he then was held:

"Failure to take an accused person's plea means that the accused has not been arraigned at all. Where no plea is taken ... the trial is a nullity... The omission is not the sort of irregularity which can be cured by section 346 of the Criminal Procedure Code [now section 388 of the CPA]".

The Court has also restated this position in **Thuway Akonaay v. Republic** [1987] TLR 92, **Naoche Ole Mbile v. Republic** [1993] TLR 253 and **Daudi Mapumba & Another v. Republic**, Consolidated Criminal Appeal No. 19 and 18 of 2000 (CAT Mbeya Unreported). In **Naoche Ole Mbile**, for instance, it was held, I quote from the headnote:

"One of the fundamental principles of our criminal justice is that at the beginning of a criminal trial the accused must be arraigned, i.e. the Court has to put the charge or charges to him I and require him to plead".

The Court also held, again quoting from the headnote, that:

"Non-compliance with the requirement of arraignment of an accused person renders the trial a nullity".

We subscribe to the position taken by the High Court in **Akbarali Walimohamed Damji** (supra) and **Venance Ndali** and, by the same parity of reasoning, are guided by our decisions in **Thuway Akonaay**, **Naoche Ole Mbile** and **Daudi Mapumba** (all supra). We can, in the light of the above authorities, summarize the position of the law thus: the arraignment of an accused person is not complete until he has pleaded. This is the requirement of the provisions of section 275 (1) of the CPA. Failure to take an accused person's plea signifies that the accused has not been arraigned at all. This becomes an incurable irregularity and vitiates the proceedings after its noncompliance. The ailment cannot be saved by section 388 of the CPA.

Another ailment is that circumstantial evidence was used to convict the appellant but no summing up to assessors was done on it. We are aware that at p. 62 of the record of appeal the trial mentioned some basic legal principles governing criminal law and circumstantial evidence was itemized as number five. However, the trial court did not go beyond that. The trial court was duty-bound to sum up adequately to the assessors on all vital points of law, especially the law relating to circumstantial evidence which it used to found conviction. Failure to do that was fatal – see: **Omari Khalfan v. Republic**, Criminal Appeal No. 107 of 2015 and **Said Mshangama @ Senga vs. R.**, Criminal Appeal NO.8 of 2014 (both unreported)

There is yet another disquieting aspect in the proceedings of this case. The record at p. 71 shows that the summing up to assessors was done on 01.08.2017. However, the same shows that the assessors gave their opinions on 14.07.2017; before the summing up was done. We have failed to understand how this could be legally possible. We could not even figure out if it was a *lapsus calami* or a keyboard mistake, for our efforts were futilized by the fact that there is no handwritten summing up notes to that effect. Perhaps it should suffice to mention here that assessors give their

opinions after the case has been summed up to them in terms of section 298 (1) of the CPA.

With regard to the sentence meted out to the appellant, this will not detain us. We discussed this at some considerable length in **Apolinary Matheo** (supra). In that case we relied on our previous decision in **Agnes Doris Liundi v. Republic** [1980] TLR 46 to observe that once an accused person is convicted of murder on more than one counts, a sentence should be inflicted on only one count. We reproduced the following excerpt from p. 50 in **Agnes Doris Liundi**:

> *"The appellant was convicted on three counts of murder. Sentence of death should only have been passed on one count. The convictions on the other two counts being allowed to remain in the record. We accordingly amend the sentence to refer to the conviction on the first count only".*

In view of the above, we hold that the trial court should have convicted the appellant on all three counts but should have sentenced him in respect of only one count; the first count. In **Apolinary Matheo** (supra), we stated our view behind that position of the law in the following terms:

"The logic encapsulated in this position is not far to seek; once a sentence in respect of the first count is executed, there will be no person against whom to execute the sentences in respect of the other counts."

In view of the ailments above, we are minded to invoke the powers of revision bestowed upon us by section 4 (2) of The Appellate Jurisdiction Act, Cap. 141 of the Revised Edition, 2002 to nullify the proceedings as from 11.07.2017 when the assessors were selected in compliance with section 265 of the CPA but the appellant was not given opportunity to express his opinion on whether or not he had an objection to all or any of the assessors. For the avoidance of doubt, this course of action saves the Preliminary Hearing conducted on 24.04.2017 before Mgetta, J. appearing at pp. 4 – 15 of the record of appeal.

As to the way forward, with due respect, we decline the invitation by Mr. Mbise to set the appellant free. With equal due respect, we agree with the learned Senior State Attorney that the justice of this case demands a retrial before another judge and a different set of assessors. We think justice will smile if we take this course of action. We therefore order that the file be remitted to the High Court for the appellant to be retried before

another judge and a different set of assessors. In the meantime, the appellant shall remain in custody to await his retrial.

Order accordingly.

DATED at **MBEYA** this 8th day of November, 2019.

I.H. JUMA
CHIEF JUSTICE

R.K. MKUYE
JUSTICE OF APPEAL

J.C.M. MWAMBEGELE
JUSTICE OF APPEAL

The Judgment delivered this 8th day of November, 2019 in the presence of Yustine Robert, the Appellant appeared in person and Mr. Ofmedy Mtenga, 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