IN THE COURT OF APPEAL OF TANZANIA
AT MBEYA

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

CRIMINAL APPEAL NO. 328 OF 2017

MONDE CHIBUNDE @ NDISHI.....APPELLANT

VERSUS

THE D.P.P. .....RESPONDENT

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

(Mambi, J.)

Dated 3rd day of August, 2017

In

Criminal Sessions No. 30 of 2016

JUDGMENT OF THE COURT

5th & 8th November, 2019

MZIRAY, J.A.

This appeal is directed against the decision of the High Court of Tanzania sitting at Sumbawanga (Mambi, J.) delivered on 3/8/2017 in Criminal Sessions Case No. 30 of 2016, which convicted the appellant, Monde Chibunde @ Ndushi, in a charge of murder contrary to sections 196 and 197 of the Penal Code, Cap 16 R.E. 2002. The appellant was alleged to have murdered his wife one Ngalo d/o Njile @ Masanja on 12/3/2015 at Chimalendi village within Mlele District in Katavi Region.

The charge was resisted by the appellant and thereby, obligating the prosecution to summon six witnesses to establish his guilt. Two exhibits were tendered, which are, the postmortem examination report (exhibit P2) and the sketch map of the scene of the crime (exhibit P1). On his part, the appellant relied on his own sworn testimony and never summoned any witness.

The findings of the learned trial judge after evaluating the evidence which was placed before him, was to the effect that the appellant was guilty to the offence with which he was charged and upon conviction he was sentenced to suffer death by hanging.

Aggrieved with the finding of the trial court, the appellant filed this appeal raising five grounds of appeal. Basically, the appellant is complaining that the circumstantial evidence upon which the conviction was grounded was not watertight. His second complaint is that the defence case was not considered.

For reasons which will be apparent in due course, we will not consider the grounds of appeal raised.

In this appeal, the appellant was present, represented by Mr. Victor Mkumbe, learned advocate; whereas Ms. Scholastica Lugongo, Senior State Attorney assisted by Mr. John Kabengula, learned State Attorney represented the respondent Republic.

When Mr. Mkumbe was called upon to argue the grounds of appeal, he intimated to us that after some consultations with the learned State Attorneys, before entering the court room, they discovered from the record of appeal that there were some ailments in the case which if the counsel were given the chance to address the Court, probably could dispose of the appeal without necessarily going into the merits of the case. We entertained the prayer and granted leave to the learned counsel to address us on the alleged defects.

It was Mr. Kabengula, on behalf of the respondent who submitted first. He took us straight to the proceedings of the trial court at page 14 of the record of appeal. He submitted that when the trial commenced on 25/7/2017, three assessors were selected but before assuming their role, the appellant was not afforded an opportunity to express whether or not he objects to all or any of the assessors. According to him the appellant

was supposed to be given such opportunity before the commencement of the trial. In his view, as that was not done, such omission not only prejudiced the appellant but also the prosecution side. Citing the case of **Laurent Salu and Five Others v. Republic,** Criminal Appeal No. 176 of 1993 (unreported), the learned State Attorney submitted that the appellant had a right to object on the set of assessors and the trial judge was duty bound to inform him on this right so as to ensure a fair trial.

His next point relates to the summing up notes to the assessors at page 100 of the record of Appeal. The learned State Attorney submitted that in the said summing up, the learned trial judge referred to extraneous evidence completely opposed to the testimony of the appellant at page 29-31 of the record of appeal. He argued that such extraneous evidence may have greatly influenced the assessors in their opinions and ultimately affected the judgment. The learned State Attorney brought to our attention that the extraneous evidence the learned trial judge referred was in respect of another case, **Shija s/o Sosoma v. R,** Criminal Appeal No. 327 of 2017 (unreported), which at page 52 (paragraph 2,3 and 4) has similar wording to those at page 100 in the instant appeal. We wish to

interject here that the hearing of **Shija Sosoma** just preceded the hearing of this case.

Lastly, the learned State Attorney expressed his disappointment on the failure on the part of the trial judge to properly address the assessors on the issue of circumstantial evidence particularly on the principle of "*the last person to be seen with the deceased,*" on which he based in grounding the conviction.

On the above reasons, the learned State Attorney submitted that the appellant was not accorded a fair trial, and for that reason he invited us to exercise our powers of revision under section 4(2) of the Appellate Jurisdiction Act, Cap 141 of the Revised Edition, 2002 (the AJA) to nullify the entire proceedings of the High Court, quash the conviction and set aside the sentence imposed and order a retrial before another judge and a new set of assessors.

Responding, Mr. Mkumbe supported fully all the points raised by the learned State Attorney. He shared the views that this Court should remit the case to the High Court for a new retrial.

We begin our discussion with the requirement of section 265 of the Criminal Procedure Act (CPA) which provides:

> *"All trials before the High Court shall be with the aid of assessors the number of whom shall be two or more as the court thinks fit."*

When we revisit the record of appeal from page 13-15, it clearly shows that on 24/7/2017 when the information was read over to the appellant three assessors were recorded to be present. The record does not show if the trial judge explained to them their duty and the appellant given an opportunity to comment on whether or not he has any objection to any of the assessors. The duty casted upon the judge to give such explanation is not statutory but is a practice which has been accepted and given recognition by our courts through various judicial authorities. For example, in the case of **Laurent Salu and five others** (supra) the Court observed 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 his 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 eye of the accused person at least, justice will 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"

(See also **Tongeni Naata v. R.** [1991] TLR 54, **Yohana Mussa Makubi and Another v. R,** Criminal Appeal No. 556 of 2015, **Hilda Innocent v.**

R, Criminal Appeal No. 181 of 2017, **Chacha Matiko @ Magige v. R.** Criminal Appeal No. 562 of 2015 and **Fadhil Yussuf Hamid v. Director of Public Prosecutions,** Criminal Appeal No. 129 of 2016 (all unreported).

All the above cited cases underscore the point, as rightly submitted by the learned State Attorney that the court must select assessors and give an accused person an opportunity to object to any of them. In the instant case, the trial court did not inform the appellant the existence of this right. The omission in our view amounted to an irregularity which must have prejudiced the appellant and the prosecution on the other side.

Next in our discussion is on the summing up to the assessors. The complaint which emerged from the learned State Attorney is that in the summing up to assessors, the learned trial judge expressed his opinion and influenced them by introducing extraneous matters which did not emerge from the evidence adduced.

We have taken a thorough perusal of the summing up notes and it is evident that at page 100 of the record of appeal the trial judge in making reference to the evidence of the appellant at page 29 – 31 of the record,

introduced a completely different version to what the appellant testified in court. In line 13 – 22 of page 100 reads:

> *"DW1 said that on 23.01.2012 he went to his first wife (the deceased) and found she is dead. He said that he reported the matter to Ntongwa who was the ten ceil leader (PW1) and later to the Kitongoji Helmet Chairman (PW2).*
>
> *Looking at the second deference witness there is no anywhere he has shown that material date he did not spent a night at his senior wife (the deceased). DW1 shows to be not serious on his evidence as he even failed to call his Young wife to testify that he spent his all night there and not at the deceased house given the nature of offence he was facing which attract severe sentence".*

Certainly, the above excerpt is misleading and does not reflect what the appellant stated in his defence. To prove that this portion of the summing up was misleading, the record is very clear that the name of PW1 in this case was Lilian Monde Machibya and not Ntongwa as it appears in the summing up notes. Likewise, PW2 in this case was one Ntunge Monde and not the Kitongoji chairman as stated by the trial judge. In our

considered view the trial judge clearly expressed his own findings of fact on the evidence and in doing so he misdirected the assessors and for that matter the summing up to the assessors was not proper to enable them to give a valuable opinion. For that matter the trial was vitiated.

What we have learnt also of interest is that the portion of the summing up we have quoted herein above surprisingly appears also in the case of **Shija s/o Sosoma,** (supra) at page 52 with same words which we reproduced. This obviously has brought confusion in the two cases but we believe that the mixing up of the proceedings in the two cases was inadvertently done by the trial judge.

The last defect pointed out by the learned State Attorney was in respect of the duty imposed on the trial judge when summing up to assessors to sum up adequately on all vital points of law. It is evident that the appellant was convicted on the basis of circumstantial evidence that he was the last person to be seen with the deceased. However, this legal point was not explained to the assessors by the trial judge; he only narrated the ingredients of the offence of murder as observed at page 77 of the record of appeal. In **Washington s/o Odindo v. R** [1954] 21 EACA 392 it was stated that:

"The opinion of the assessors can be of great value and assistance to the trial judge but only if they fully understand the facts of the case before them in relation to the relevant law".

(see also **Augustino Lodaru v. R,** Criminal Appeal No. 70 of 2010 (unreported)).

Since the vital point of law in this case was circumstantial evidence and the last person to be seen with the deceased was the appellant, then the trial judge had an obligation to sum up to the assessors and direct them on those points of law. In this case, as the trial judge failed to address the vital point of law regarding circumstantial evidence, then it cannot be said that the trial was with the aid of assessors as envisaged under section 265 of the CPA.

As to the way forward, we quite agree with the proposition made by counsel for the parties. In the circumstances, we invoke our power of revision under section 4(2) of AJA and nullify the proceedings of the High Court as from 24/7/2017 when the assessor were selected but not introduced to the appellant with a view to expressing his opinion on whether or not he had any objection to all or any of them. This course of

action saves the Preliminary Hearing conducted by Mgetta, J. on 4/5/2017. We order a retrial before another judge with new set of assessors.

The appellant shall in the meantime remain in custody to await the new trial.

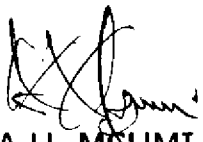
DATED at **MBEYA** this 8th day of November, 2019.

I.H. JUMA
CHIEF JUSTICE

R.E.S. MZIRAY
JUSTICE OF APPEAL

J.C.M. MWAMBEGELE
JUSTICE OF APPEAL

The Judgment delivered on this 8th day of November, 2019 in the presence of the Appellant in person, unrepresented and Mr. Ofmedy Mtenga learned State Attorney for the respondent is hereby certified as a true copy of the original.



A.H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL