IN THE COURT OF APPEAL OF TANZANIA
AT TANGA

(CORAM: MUGASHA, J.A., KOROSSO, J.A., And MWANDAMBO, J.A.)

CRIMINAL APPEAL NO. 107 OF 2020

MASHAKA ATHUMANI @ MAKAMBA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal against conviction and sentence from the judgment of the High Court of Tanzania at Tanga)

(Mkasimongwa, J.)

dated the 25th day of March, 2019
in
Criminal Sessions Case No. 8 of 2017

JUDGMENT OF THE COURT

26th May & 4th June, 2021

MWANDAMBO, J.A.:

Mashaka Athumani @ Makamba, the appellant, was charged before the High Court, Tanga Registry sitting at Korogwe on two counts in an information of murder. The particulars in the information predicated under section 196 and 197 of the Penal Code [Cap 16 R.E.2002 now R.E. 2019], alleged that on 25/04/2011 the appellant murdered Amina d/o Mashaka @ Athumani and Masefu d/o Mashaka @ Athumani at a village called Misima Mabanda, Handeni District, Tanga region. As the appellant pleaded not guilty, he stood trial which resulted into his conviction as charged followed by the mandatory death

sentence. Aggrieved, he is now before the court protesting his innocence.

For a reason which will become apparent shortly, we have not found it necessary getting into the nitty gritty of the facts of the case except those which are directly relevant for the purpose of this judgment. The appellant was married to Mwanaisha Nassoro Gumbo (PW1) with whom he was blessed with five children; Nassoro, Ally, Tamasha, Amina and Masefu. A dispute arose in the course of their relationship which saw the appellant moving from the home of the parents of his wife where they stayed. He left and went to stay elsewhere. On 25/04/2011, in the morning, the appellant approached PW1 with a request to collect three of the children and stay with them at Mkata namely; Amina, Tamasha and Masefu to which she unsuspectingly obliged. Later in the evening, the appellant moved with the three children in the absence of PW1. Despite his resolve to stay with all three children, Tamasha Mashaka (PW2) who was 9 years at the time could not stay with him, for she was escorted back to her mother during the same night. For reasons which are not apparent from the record, Tamasha was left at her aunt's home that night. There was an unpalatable tale on what the appellant did to her daughter that night

and the exchange with his sister-in-law but we do not find worth saying anything more than just a mention of it.

The following day, on 26/04/2011 in the morning, PW1 saw a dead body of Masefu Mashaka lying near the door to the house she was staying. Later on, PW1 was informed of another dead body of Amina Mashaka found lying somewhere in the village. Dr. Mussa Athuman Kimweri (PW4) who conducted the autopsies of the dead bodies posted his findings in the post-mortem reports exhibits P1 and P2 revealing that the cause of the deaths was paralysis of the nerves as a result of neck bone fracture resulting from strangulation. Subsequently, the bodies of the deceaseds were buried a day later in the absence of the appellant.

Initially, the appellant was tried and convicted by Khamis, J in Criminal sessions Case. No. 19 of 2013. On appeal in Criminal Appeal No.387 of 2015, the Court held that trial to be a nullity by reason of irregularities in the hearing in which assessors who sat with the trial Judge overstepped their limit by cross examining witnesses contrary to the provisions of section 177 of the Evidence Act [Cap.6 R.E.2002]. In the end, the Court quashed the proceedings and conviction and set aside the sentence with an order for retrial which resulted in Criminal Sessions Case No. 8 of 2017 the subject of the instant appeal.

The lay assessors who sat with the learned trial Judge in pursuance of section 265 of the Criminal Procedure Act, [Cap. 20 R.E. 2002 now R.E. 2019] henceforth the CPA, returned a verdict of guilty. The verdict followed the trial Judge's summing up notes he made in terms of section 298 (1) of the CPA. Apparently, the learned trial Judge concurred with the assessors convicting the appellant as charged followed by the sentence as alluded to earlier on. Challenging his conviction and sentence, the appellant lodged a memorandum of appeal followed by a supplementary memorandum through Mr. Warehema Kibaha, learned advocate assigned to represent him. Before Mr. Kibaha took the floor to address us, the appellant drew our attention to the yet another supplementary memorandum which had not yet found its way into the record. There being no objection against the move and in the interest of justice we granted the appellant leave to argue his belated ground predicated on the summing up notes alleged to be inadequate. We heard the learned advocate on the additional ground ahead of the rest.

Addressing the Court, Mr. Kibaha pointed out several deficiencies in the summing up notes appearing at pages 61-75 of the record of appeal. In particular, the learned advocate argued that although the trial

Judge grounded conviction on the evidence indicating that the appellant was the last person to be seen with the deceased, he did not address the lay assessors on the application of that principle. By reason of the omission, Mr. Kibaha implored us to accept that the assessors made their opinions without the benefit of adequate summing up on the evidence which was fatal to the trial and the resultant conviction and sentence. Going forward, Mr. Kibaha was candid that the justice of the case warranted a retrial before a different judge and a new set of assessors.

Mr. Waziri Magumbo, learned State Attorney who teamed up with Ms. Elizabeth Muhangwa also learned State Attorney was in agreement that the summing up notes were indeed inadequate. In addition, Mr. Magumbo pointed out that the learned trial Judge omitted to direct the assessors on the appellant's defence of alibi as well as the extra judicial statement which was fatal to the trial and the resultant conviction.

Unlike Mr. Kibaha, the learned State Attorney invited the Court to order a retrial from the stage the trial Judge made summing up to the lay assessors. He urged us to direct the trial Judge to prepare fresh summing up notes to the same set of assessors and thereafter invite them to give their fresh opinions. The learned State Attorney reinforced

his stance with our decision in **The Director of Public Prosecutions v. Ismail Shebe Islem & Others**, Criminal Appeal No. 266 of 2016 (unreported) in which the Court made a similar order.

Mr. Kibaha had a different view arguing that such course of action will be prejudicial to his client in that it will not accord with the principle that justice should not only be done but it must be seen to have been manifestly done.

There is no dispute anymore that the summing up notes are, with respect, deficient. Firstly, whereas the appellant's conviction was largely grounded on circumstantial evidence particularly on the evidence that the appellant was the last person to be seen with the deceased, the trial Judge did not address the assessors on the application of that principle to the facts of the case. Similarly, the learned trial Judge did not direct the lay assessors on the evidence from the extra judicial statement regardless of the fact that it did not feature in his judgment. Finally, the summing up notes are silent on the appellant's defence of alibi and to what extent it was applicable to the facts of the case.

It is settled that inadequate summing up notes have the effect of violating the provisions of section 265 of the CPA which requires all trials before the High Court to be with the aid of assessors. We have said so

in numerous cases amongst others; **Charles Lyatii @ Sadala v. R**, Criminal Appeal No. 290 of 2011 (unreported) cited in **DPP v. Ismail Shebe Islem and Others** (supra), **Ferdinand S/o Kamande & 5 Others v. DPP**, Criminal Appeal No. 390 of 2017 and **Hilda Innocent v. R**, Criminal Appeal No. 181 of 2017 (all unreported). The effect of inadequate summing up renders the trial a nullity, for the assessors are taken to have been denied their meaningful participation in the trial from the beginning to the stage of giving their opinions. Logically, the giving of the opinions presupposes that the assessors were adequately addressed on all key issues in the case for them to give their meaningful opinions to the trial Judge. Arising from that principle, in the majority of the cases, the Court nullified the trials and the resultant convictions and sentences with orders for retrials before different judges and set of assessors except where the interest of justice dictated otherwise in line with the decision of the defunct Court of Appeal for East Africa in **Fatehali Manji v. R** [1966] E.A. 343. Fortunately, both counsel agree that interest of justice warrants an order for a retrial. Their point of departure lies in the extent of the retrial which remains an issue for our determination.

Admittedly, the answer to the issue is not a straight forward one. This is more so because the invitation extended to us by Mr. Magumbo is, but an exception to the general rule which requires us to order a fresh trial before a new judge and set of assessors. We are mindful that in **DPP v. Ismail Shebe Islem's** case (supra) cited to us by Mr. Magumbo, the Court limited the scope of the retrial having taken into account the fact that a fresh trial would not have been feasible since some of evidence was no longer available, amongst others factors, relying on **Makumbi Ramadhani Makumbi & 4 Others v. R**, Criminal Appeal No. 199 of 2010 (unreported). In a subsequent decision in **Michael Maige v. R**, Criminal Appeal No. 153 of 2017 (unreported), the Court took a similar approach but did so without reference to **DPP v. Ismail Shebe Islem's** case neither did it assign any reason why it took that approach.

Be it as it may, alive to the principle that each case must be decided on the basis of its peculiar facts, we are inclined to accept the invitation extended to us by Mr. Magumbo. What are these peculiar facts then? Firstly, and most crucial, as alluded to earlier on, this appeal emanates from a conviction and sentence in a second trial. The first trial was declared a nullity by this Court in Criminal Appeal No. 387 of 2015

since the trial Judge allowed assessors to cross examine witnesses and hence a fresh trial giving rise to this appeal. In our view, the scales of justice weigh against subjecting the appellant for the trial for the third time in respect of the same offence. Secondly, the offence on which the appellant stood trial twice happened in April 2011, slightly over ten years ago. The Court's observation in **Marko Patrick Nzumila and Another v. R**, Criminal Appeal No. 141 of 2010 (unreported) appearing at page 25 in **Makumbi Ramadhani Makumbi & 4 Others v. R** (supra) cannot be more apt. At the risk of making this judgment unduly long, we find it compelling to reproduce the relevant excerpt thus: -

> *"The term "failure of justice" has eluded a precise definition, but in criminal law and practise, case law has mostly looked at it from an accused/appellant's point of view. But in our view the term is not designed to protect only the interests of the accused. It encompasses both sides in the trial. Failure of justice or (sometimes, referred to as "miscarriage of justice") has, in more than one occasion been held to happen where an accused person is denied an opportunity of an acquittal (see for instance* ***WILLBARD KIMANGO V. R.*** *Criminal Appeal No. 235 of 2007 (unreported)) but in our considered view, it equally occurs where the prosecution is denied an opportunity of a conviction. This is because, while it is always safe to err in acquitting than in punishment, it is also in the interests of*

the state that crimes do not go unpunished. So, in deciding whether a failure of justice has been occasioned, the interests of both sides of the scale have to be considered."

We are mindful that the excerpt reproduced above was made in a case involving a case in which two witnesses before the trial court testified without taking oath. Needless to say, we are satisfied that the principle made therein is relevant in this appeal. Weighed from that perspective, we are not oblivious of the likelihood of denying opportunity of conviction in case a fresh trial is ordered owing to the fact there is no guarantee of procuring witnesses in an offence which occurred over ten years ago. For instance, E 7017 D/Cpl. Jerome (PW4) who investigated the case was, by 12/03/2019 when he testified before the High Court in a second trial was no longer at Handeni District. The difficulties in procuring him from his new work station again cannot be understated. In the circumstances, all factors taken into account, we do not think this is a fit case for ordering a fresh trial in the manner submitted by the learned advocate for the appellant. Indeed, in all fairness, the learned trial Judge made very detailed salient facts of the case and had assessors participate in the trial except for the non-direction on some of the key aspects of the evidence to the lay assessors before they were

invited to give their opinions. In other words, unlike in some of the cases we have laid our hands on in which there was evidence of irregularities in the selection of the assessors and their overall participation in the trial. There is no such issue in this appeal warranting an order for a fresh trial as we did in **Lazaro Katende v. R**, Criminal Appeal No. 146 of 2018, **Apoiinary Matheo & 2 Others v. R.**, Criminal Appeal No. 436 of 2016, **Ferdinand s/o Kamande & 6 Others v. The DPP**, Criminal Appeal No. 390 of 2017 and **Hilda Innocent v. R.**, Criminal Appeal No. 181 of 2017 (all unreported) amongst others. It is for the foregoing that we think ordering a fresh summing up to the assessors serves interest of justice better than ordering a fresh trial.

The above said, we quash the proceedings of the trial court from the stage of the summing up as well as the judgment. Having set aside the judgment, we quash the appellant's conviction and set aside the sentence and direct the trial Judge to prepare fresh summing up notes incorporating all key aspects in the case before the same set of assessors from which they can give their opinions before composing judgment afresh in accordance with the law. Given the peculiar circumstances in the case, we direct that the order we have made be

implemented as soon as practicable. In the meantime, the appellant shall remain in custody.

Order accordingly.

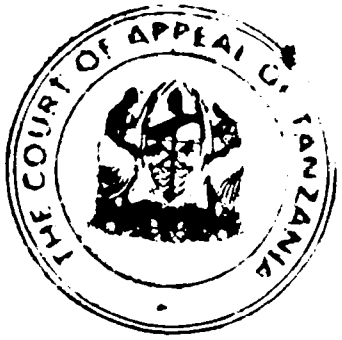
DATED at **TANGA** this 3rd day of June, 2021.

S. E. A. MUGASHA
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

The Judgment delivered this 4th day of June, 2021 in the presence of Mr. Warehema Kibaha, learned counsel for the Appellant and Mr. Joseph Makene, learned State Attorney for Respondent/Republic, is hereby certified as true copy of the original.



F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL