IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

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

CRIMINAL APPEAL NO. 132 OF 2019

EMMANUEL SHOMARI @ KOBELO.....APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

(Appeal from the Decision of the High Court of Tanzania at Dar es Salaam)

(Mlyambina, J.)

Dated the 18th day of March, 2019

in

Criminal Sessions Case No. 108 of 2016

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JUDGMENT OF THE COURT

1st June, & 2nd August, 2021

GALEBA, J.A.:

Emmanuel Shomari @ Kobelo, the appellant, was charged for having murdered Shaban Said (the deceased) who, before his untimely demise, had been attacked and seriously injured on his head, upper arms and the legs by a sharp object in the early hours of 5th December 2013. The deadly assault was inflicted on the deceased in his rented room at Manzese Argentina within Kinondoni District in Dar es salaam region. He was declared dead upon arrival at Mwananyamala Hospital in the same morning. Consequent to the said death, the appellant was arrested, charged and was convicted on allegations of causing the death. Upon

conviction under section 196 the Penal Code [Cap 16 R.E. 2002] now [R.E. 2019] (the Penal Code) a mandatory death sentence was imposed upon him by the High Court of Tanzania at Dar es Salaam under section 197 of the same Act. He was aggrieved, hence this appeal.

The brief facts of the matter at the trial before the High Court as depicted from the prosecution evidence in the record of appeal was that at night on 4th December 2013, Asha Miraji, (PW2), saw the appellant with the deceased at the latter's home in the back yard. Later in the night the witness heard a heavy bang like a falling object followed by the words *"Kobelo kwa nini"* from the deceased's room. This witness was a co-tenant with the deceased and their rooms were separated by a wail and thus she could hear the words of the deceased. Sida Mohamed (PW1), went to the diseased home very early in the morning on 5th December 2013 and found the latter laying in the pool of blood but he only managed to mention one word; *"Kobelo"*. Ramadhani Msabaha (PW3), saw the appellant with the deceased at the latter's home in the evening on 4th December 2013. Rajab Said (PW4), participated in rushing the deceased to Mwananyamala hospital from the scene of crime. Bakari Sultani, (PW5) met the appellant at the deceased's doorstep and told the witness that he was rushing to Vingunguti to buy beef. 7942 CPL Sylvester (PW6) recorded the statement

of the appellant and testified that the appellant admitted to have committed the offence. Dr. Julius Narcis Riwa testified that the cause of the deceased's death was acute blood loss following multiple wound cuts on the head, arms, hands and the limbs of the deceased. E5759 DTC CPL Haji (PW7) (although he was the 8th witness to testify) testified on what he was told by PW5 and Mwanaidi Madeni (PW8) was the Justice of Peace who recorded the appellant's extra judicial statement and tendered it in court. In short, the substance of the prosecution evidence was that the appellant is person who caused the death of the deceased.

As for the defence, Emmanuel Kobelo (DW1) who was the sole witness stated that on 8th December 2013 he was attacked by three people who were referring to him as a thief and a murderer and that they grabbed and seized from him all that he had bought and put him under arrest. He testified further that the said persons made a big fire and burnt his right hand and wounded him on the leg and thus he was rendered unconscious and taken to hospital. Finally, he stated that he was surprised to find himself being tried in connection with the death of the deceased. Nonetheless, after a full trial, he was convicted and sentenced as indicated above.

To challenge the judgment of the High Court, the appellant lodged a substantive memorandum of appeal containing fourteen (14) grounds followed by two separate supplementary memoranda; one with two (2) grounds and another with four (4) grounds which was lodged by Mr. Albert Gaspar Msando, learned advocate for the appellant. However, for reasons that will become apparent herein, we need not reproduce all the grounds in this judgement, except the second ground of appeal in the supplementary memorandum of appeal which was lodged by Mr. Msando, which is to the following effect:

> *"That the honourable trial judge erred in law in his summing up of the case to the gentlemen and lady assessors, by failing to bring to their attention the legal issues pertaining to questions of proper identification of the accused, dying declaration and the probative value of the opinion of an expert."*

When this appeal was called on for hearing, the appellant, as earlier indicated, had the services of Mr. Albert Gaspar Msando, learned advocate and for the respondent Republic was Ms. Anita Sinare, learned Senior State Attorney assisted by Mr. Benson Mwaitenda, learned State Attorney. Noteworthy, in their respective submissions at the hearing of the sole ground of appeal, both, Mr. Msando and Ms. Sinare were of the common position that, the trial judge's summing up to assessors did not meet the

minimum threshold requirements set by law. Indeed, counsel were of the same position as regards the way forward, in this appeal.

Elaborating in support of the appeal on the deficiencies in the summing up, Mr. Msando submitted that when summing up to assessors the trial judge did not address the assessors on vital points of law upon which the decision of the court would be based. He stated that, as partly the case was decided based on the evidence of *visual identification* as per the evidence of PW5, *dying declaration* as per the evidence of PW2 and also *extra judicial statement* which was recorded by PW8, then the trial court was duty bound to explain to the assessors during the summing up how these concepts applied to the case, before they were required to give their opinion. He contended however that the trial judge did not address the assessors on any of those points.

According to Mr. Msando, the omission is fatal to the entire proceedings rendering the trial a nullity. In the circumstances, he prayed that the proceedings and the judgment be nullified, the conviction quashed and the sentence set aside. He added that ordinarily, the Court would have ordered a retrial if the appellant would not be prejudiced. However, in his submission, in the instant case because of the shortfalls in the evidence, he implored the Court to acquit the appellant and set him to liberty.

In reply, as earlier on indicated, Ms. Sinare's position was on all fours with that of Mr. Msando. She submitted that, indeed, the trial judge did not explain the essential points of law to the assessors when summing up the case to them. In support of her stance she relied on the case of **Kato Simon and Another v. the Republic**, Criminal Appeal No. 31 of 2017 (unreported) where it was held that the ingredients of the offence of murder must be explained in the summing up to assessors including how malice aforethought can be proved. She contended that the learned judge dealt with the evidence but not the points of law. Like her counterpart, counsel for the appellant, Ms. Sinare submitted that the entire proceedings and judgement being a nullity ought to be nullified, the conviction quashed and the sentence set aside. She, finally, observed that in view of the shaky evidence in the record of appeal, the appellant ought to be acquitted and released from jail as a retrial will be prejudicial to the appellant. It is noteworthy that before she made the observation, like Mr. Msando, she navigated the evidence at a considerable length in justifying her position on the way forward.

On our part, having thoroughly reviewed the record and accorded the arguments of the counsel due consideration, we propose to start with the substantive law regulating participation of assessors in criminal trials before

the High Court. The relevant provisions of law is section 265 of the Criminal Procedure Act [Cap 20 R.E. 2019] (the CPA), which provides that:

> *"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."*

Supplementing the above provision, is section 298(1) of the same Act, which is to the effect that after closure of both the prosecution and the defence cases, the trial judge is required to sum up evidence of both sides, before he can call them to give their opinion. That section provides that:

> *"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."*
> [Emphasis added]

As the submissions of both counsel concerned the omission by the trial judge to address assessors on vital points of law, we think it is most desirable at this juncture to point out as to what amounts to a vital point of law. Admittedly, there is no a specific definition of a vital or important point of law that a trial judge has to address assessors upon, as observed by the Court in **Kato Simon and Another** (supra) and therefore each case must

be decided on its own merits. Nonetheless, there are points that are generally taken as vital points of law which a trial judge must address to assessors if such points arise in a trial before him. The points include *circumstantial evidence*, if it appears to the trial judge that there was no direct evidence and the case is likely to be solely decided upon such evidence. The other is a *dying declaration*, if the deceased made statements as to the cause of his death incriminating the accused and *visual identification* where the offence was committed in circumstances of impaired visibility to a human eye. The defence of *alibi* is another vital point of law where the accused raises it. Reliance on *cautioned statements*, *extra judicial* statements or any *evidence requiring corroboration* are matters generally taken as essential points of law which must be addressed to assessors.

The explanation by the trial judge of the *standard of proof, the burden of proof* and who bears it are matters falling under the category of vital points. *The ingredients* of the offence, issues of malice aforethought and how is it proved are too, critical points necessary to be explained to assessors in a case. The list of vital points of law for purposes of addressing lay assessors in criminal trials is inexhaustive and endless, it all depends on a particular case and its unique facts.

We now revert to the summing up to assessors and its shortcoming in the instant case. The summing up is contained in twelve pages from page 70 to page 82 of the record of appeal. Out of the twelve pages, eleven were set aside for summarizing the substance of the evidence of all witnesses and the remaining page contains issues for resolution and a few directives. In the respective summing up, we note that the vital points of law which were apparent were not made known to the assessors by the trail judge. We therefore, generally agree with both counsel that the trial court omitted to address vital points of law to the assessors.

The vital points which were relevant to the case at the trial were, **firstly**, visual identification because the evidence of PW5 was that he met the appellant at the deceased's room very early in the morning, so the trial court was duty bound to explain the fact and the impact of impaired visibility and the points necessary to be proved in order for such evidence to be taken as credible. **Secondly,** malice aforethought in a murder trial, that is, the *mens rea* and how it was supposed to be proved by the prosecution. **Thirdly,** circumstantial evidence, because there was no direct evidence in the case and as the accused was convicted based on it. **Fourthly**, though the trial judge relied on the dying declaration

(deceased's words like *Kobelo kwa nini*), the aspect and its implications were not explained in his summing up to the assessors.

In this case, although selection of assessors was properly done, their duties and responsibilities well explained and the substance of the evidence legally summarized to them, the above omission, that is, to address assessors on the vital points of law, vitiated the proceedings and rendered the trial a nullity.

The position of the law is that, inadequate summing up, non-direction or misdirection on vital points of law to assessors is tantamount to trial without the aid of assessors contrary to the provisions of sections 265 and 298(1) of the CPA. Where those provisions are offended the trial is a nullity as held in **Said Mshangama Asenga v. The Republic,** Criminal Appeal No. 8 of 2014, **Halfan Ismail @ Mtepela v. The Republic,** Criminal Appeal No. 38 of 2019 and **Weda Mashilimu and Six Others v. The Republic,** Criminal Appeal No. 375 of 2017 (all unreported). Particularly, in the latter case in which the issue of circumstantial evidence was not adequately addressed to assessors this Court stated that:

> *"In view of the omission to address the assessors on the salient points of law as discerned in this case, it is clear as argued by the learned counsel for both sides, that the learned trial judge did not comply with sections 265 and*

298(1) of the CPA. Non-compliance with the stated provisions in effect meant that the trial was conducted without the assistance of the assessors. Consequently, what is on the table is that the trial, final judgment and sentence were vitiated and the trial rendered a nullity."

In view of the above pointed out omission, we allow the appeal based on the sole ground of appeal. In the event, exercising revisionary powers of this Court under section 4(2) of the Appellate Jurisdiction Act [Cap 141 R.E. 2019], we nullify the entire proceedings and the judgment of the High Court, quash the conviction and set aside the sentence of death meted out against the appellant.

Consequently, as the sole ground suffices to dispose of the appeal, we find that venturing into discussing other grounds of appeal, would be frivolous with no useful purpose to serve, we will therefore not deal with any of them.

As to the way forward, counsel for both parties were of the view that, the appellant be acquitted and released from prison forthwith for lack of sufficient evidence to sustain the conviction. However, on our part, having examined the facts of the case as portrayed in the record of appeal, and the nature of the proceedings, in the interest of justice, we respectfully differ with the concurrent submissions of both counsel. Ultimately, we

order that the appellant, Emmanuel Shomari @ Kobelo be tried afresh at the High Court before another judge assisted by a new set of assessors. In the meantime, the appellant shall remain in custody as a remandee pending retrial.

It is so ordered.

DATED at **DAR ES SALAAM**, this 29th day of July, 2021

R. K. MKUYE
JUSTICE OF APPEAL

F. L. K. WAMBALI
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

The Judgment delivered this 2nd day of August, 2021 in the presence of appellant linked via video conference from Ukonga Prison and Mr. Emmanuel Shomari Kobelo, counsel for the Appellant and Ms. Estazia Wilson, learned State Attorney for the Respondent is hereby certified as a true copy of the original.

G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL