**IN THE COURT OF APPEAL OF TANZANIA**

**AT IRINGA**

**(CORAM: WAMBALI, J.A., LEVIRA, J.A. And MAIGE, J.A.)**

**CRIMINAL APPEAL NO. 506 OF 2020**

**CHESCO MVEKA ..... APPELLANT**

**VERSUS**

**THE REPUBLIC..... RESPONDENT**

**[Appeal from the Decision of the High Court of Tanzania Iringa District Registry at Mafinga]**

**(Matogolo, J.)**

**Dated the 30th day of July, 2020**

**in**

**Criminal Sessions Case No. 54 of 2016**

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# JUDGMENT OF THE COURT

*4th & 7th November, 2022*

**WAMBALI, J.A.:**

The appellant, Chesco Mveka was arraigned before the High Court of Tanzania Iringa District Registry (the trial court) at Mafinga, where he faced the charge of murder contrary to the provisions of section 196 of the Penal Code [Cap 16 R.E. 2002, now R.E. 2022] (the Penal Code). The particulars contained in the information alleged that on 4th April, 2013 (the fateful date) at Ugenza village in Mufindi District within Iringa Region, the appellant murdered Serijo Mdundwige.

At the trial, the prosecution case depended on four witnesses; namely, Joseph Mdana (PW1), Natalion Mdundwige (PW2), E. 3937 CPL Gregory (PW3) and Zacharia Solomon Mushi (PW4). In addition, the Post-Mortem Examination Report, sketch plan, cautioned statement and extra judicial statement of the appellant were tendered and admitted as exhibits P1, P2, P3 and P4 respectively.

For the purpose of this judgment, we do not intend to revisit in detail the evidence of the parties on record. Briefly, the substance of the prosecution case was to the effect that, the appellant was responsible for murdering the deceased on the fateful date as he slaughted him on the neck and socked the knife which he had used on the cut throat and disappeared before he was arrested and sent to Mafinga Police Station. The Post-Mortem Report (exhibit P1) revealed that the cause of death of the deceased was severe bleeding caused by multiple body injuries. It was further the evidence of the prosecution that upon being arrested, the appellant confessed before PW3, who recorded the cautioned statement on 10th February, 2015 and that he did the same to PW4 who recorded the extra judicial statement.

In his defence, though the appellant admitted to have known the deceased, he categorically denied having murdered him as alleged by the prosecution. He stated that on the fateful date, he was told that the clan of Chaula were looking for the person who killed their relative, one Franco Chaula, and that the person who was accused was Serijo Mdundwige (the deceased), who was by then locked up in the village office. It was his claim that the deceased was killed by the group of people who went into the village office on 4th April, 2013 and took the deceased and assaulted him. He denied to have been part of the said group. He testified further that he left the village to Mbingu Morogoro where he was working and returned back to Ugenza village in 2015 and was surprised to be arrested by the police on 10th February, 2015 and sent to Mafinga Police Station in connection of the death of the deceased. He also denied to have confessed killing the deceased as alleged by the prosecution.

At the conclusion of the trial, the trial judge believed the prosecution evidence and discredited the appellant's defence. He thus made the finding to the effect that the prosecution case was proved beyond reasonable doubts. Consequently, he convicted the appellant, and in terms of section 192 of the Penal Code, sentenced him to suffer death by

hanging. It is the finding and conviction of the appellant by the trial court which has prompted the appeal before the Court.

Noteworthy, upon being served with the record of appeal, the appellant lodged the memorandum of appeal containing four grounds of appeal. However, the said memorandum of appeal was later substituted in terms of rule 73 (2) of the Tanzania Court of Appeal Rules, 2009 by Mr. Jassey Samuel Mwamgiga, learned advocate who was assigned to represent the appellant. The decision of the trial court is therefore contested on the following single ground of appeal:

> *"The trial against the appellant was not properly conducted as the gentleman assessors were not properly involved by the trial judge."*

At the hearing of the appeal, Mr. Mwamgiga appeared for the appellant, who was also in attendance. On the adversary side, Ms. Magreth Mahundi, learned State Attorney, entered appearance for the respondent Republic.

Mr. Mwamgiga submitted that according to section 265 [as it was before the amendment by the Written Laws (Miscellaneous Amendments) Act, No. 1 of 2022] of the Criminal Procedure Act [Cap 20 R.E. 2002, now R.E. 2022] (the CPA), trials before the High Court in murder cases had to

be with the aid of assessors. He thus argued that, in the case at hand, though assessors were present during the trial, they were not fully involved by the trial judge. The epicentre of his submission was premised on two matters. **One,** that, though assessors were duly selected as required by section 285 (1) of the CPA, the trial judge did not explain to them their role and responsibilities before the trial commenced. In his view, the omission rendered the trial a nullity as assessors were called upon to participate in the trial without knowing what they were expected to do to assist the trial judge during the trial to reach a fair decision.

**Two,** that the trial judge partially complied with the requirement stipulated under the provisions of section 298 (1) of the CPA during the summing up to assessors. He explained that, according to the record of appeal, though in his summing up notes the trial judge outlined in passing to assessors on the possible defences in murder trial to include provocation, self-defence, intoxication, mistake of fact, necessity, compulsion and accidental; he did not explain to them their meaning and the implication in the circumstance of the case before that court. Unfortunately, he stated, in his judgment, the trial judge discussed extensively the defence of provocation which the appellant had raised in his defence.

In this regard, Mr. Mwamgiga submitted that the omission of the trial judge to bring to the full attention of assessors the defence of provocation as a vital point of law in the case that confronted the appellant, disabled them to offer meaningful opinion on the matter which could have ultimately determined the fate of the appellant.

He thus submitted that the omission of the trial judge to inform assessors their responsibilities and the vital point of law rendered the trial court's proceedings a nullity as miscarriage of justice was occasioned. To support his submission, he referred us to the decision in **Batram Nkwera @ Mhesa v. The Director of Public Prosecutions,** Criminal Appeal No. 567 of 2019 (unreported).

Mr. Mwamgiga concluded his submission by arguing that, as the trial was rendered a nullity, the proceedings be nullified, conviction quashed and sentenced imposed on the appellant set aside. He added that considering the circumstances of the case, a retrial be ordered before another judge.

The submission by Mr. Mwamgiga was readily supported by Ms. Mahundi, who unreservedly supported the appeal and urged the Court to allow it. She added that a retrial should be conducted before another

judge in accordance with the requirement of the law as prescribed under section 265 (1) of the CPA in respect of the involvement of assessors.

Having heard the concurrent submissions of the counsel for the parties, we entirely agree that the involvement of assessors during the trial in the case at hand was not consistent with the requirement of the law. Guided by the record of appeal, there is no indication that the trial judge informed and explained to the assessors their role and responsibilities before the trial commenced. What is apparent is that, soon after the assessors were selected and the appellant stated that he had no objection to any of them, the first prosecution witness started to testify.

The need for the trial judge to explain to the assessor the role they are expected to play in the trial is mandatory and its omission disables their full participation and renders their opinion meaningless.

At this juncture, we deem it appropriate to reiterate what the Court stated in **Laurent Salu and Five Others v. The Republic,** Criminal Appeal No. 176 of 1993 (unreported) on the important steps which must be observed by trial court in murder trials with the aid of assessors thus:

> *"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 carefuiiy expiain 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 avaii 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 defences.*
6. *The Court to require the individual opinion of each assessors and to record the same."*

It is noteworthy that, the Court gave the same guidance on the procedure which the trial judge should follow in trial with aid of assessors in **Bashiru Rashid Omar v. SMZ,** Criminal Appeal No. 83 of 2009 (unreported).

More particularly, the Court in **Hilda Innocent v. The Republic,** Criminal Appeal No. 181 of 2017 (unreported), explained the importance of trial court's duty to ensure that assessors understand the role which they are expected to play during the trial in the following terms: -

> *"...although informing the assessors on their role and responsibility is a rule of practice and not a rule of law, as it is for a long time an established and accepted practice in order to ensure their meaningful participation, a trial judge must perform this task immediately after ascertaining that there is no any objection against any of the assessors by the accused before commencing the trial. It is also a sound practice that a trial judge has to show in the record that this task has been fully performed. For even logic dictates that whenever a person is called upon to assist in performing any task or to offer any service, he must be fully informed of what is expected of him in performing that task. Thus, failure to inform assessors on their role and responsibility in the trial diminishes their level of participation and renders their participation which is a requirement of the law meaningless."*

In the case at hand, we are satisfied that the omission of the trial judge to explain to the assessors their role vitiated the trial and rendered the proceedings a nullity.

On the other hand, with respect, we are settled that the omission by the trial judge to explain the defence of provocation to the assessors while he later discussed and rejected it in his judgment, was improper. In **Fadhil Yussuf Hamad v. The Republic,** Criminal Appeal No. 129 of 2016 (unreported), the Court stated as follows:

> *"...The Court has to point out to assessors any possible defences and explain to them the law regarding those defence."*

In the present case, as correctly stated by the appellant's counsel and indeed it is apparent in the record of appeal that, in his summing up to assessors, the trial judge simply mentioned the defences which might have been available to the appellant, including that of provocation; but did not explain to the them the law with regard to it which he later extensively discussed in the judgment and rejected it.

In **Bharat v. The Queen** [1959] AC 533 it was held that:

> *"...where assessors are misdirected in a vital point, such as provocation, the trial judge cannot be said to have been aided by those assessors."*

It was in this regard that when the Court dealt with the similar issue in **Tuliguzya Bituro v. The Republic** [1982] T.L.R. 264, it stated as follows:

> *"Since we accept the principle in Bharat's case as being sensible and correct, it must follow that in criminal trial in the High Court, where assessors are misdirected on a vital point, such a trial cannot be construed to be with the aid of assessors. The position would be the same where there is non-direction to the assessors on vital point."*

We thus have no hesitation to state that non-direction by the trial judge on the defence of provocation and its legal implication constituted as serious error. This is more so because, the trial judge extensively discussed and rejected it in the course of composing the judgment without having explained to the assessors before they stated their opinion. It is therefore not surprising that, their opinions did not concern the issue of provocation at all.

In the circumstances, we are settled that the omission by the trial judge on the two issues stated above rendered the trial a nullity. We accordingly allow the sole ground of appeal and the appeal in its entirety.

Consequently, we nullify the proceedings, quash conviction and set aside the sentence imposed on the appellant. In the result, we order that a retrial be conducted before another judge in accordance with section 265 (1) of the CPA in respect of involvement of assessors. Meanwhile, the appellant shall remain in custody pending retrial.

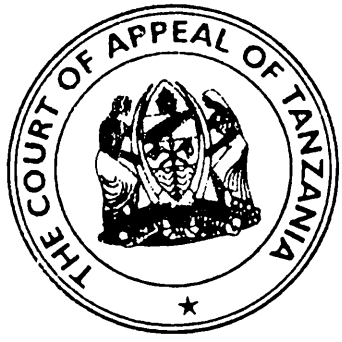
**DATED** at **IRINGA** this 5th day of November, 2022.

F. L. K. WAMBALI
**JUSTICE OF APPEAL**

M. C. LEVIRA
**JUSTICE OF APPEAL**

I. J. MAIGE
**JUSTICE OF APPEAL**

This Judgment delivered this 7th day of November, 2022 in the presence of Mr. Jassey Mwamgiga, the learned counsel for the Appellant and Ms. Veneranda Msai, State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.




J. E. FOVO
**DEPUTY REGISTRAR**
**COURT OF APPEAL**