IN THE COURT OF APPEAL OF TANZANIA

AT MUSOMA

CORAM: MKUYE, J.A., MWANDAMBO, J.A. And MAIGE, J.A.)

CRIMINAL APPEAL NO. 21 OF 2020

RICHARD PAULO OSAWE @ MADEBE @ OGARE ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the judgment of Resident Magistrate's Court of Musoma at Musoma with extended jurisdiction)

(Mushi, RM-EXT.)

dated the 22nd day of December, 2019

in

Criminal Sessions No. 04 of 2019

JUDGMENT OF THE COURT

30th May & 2nd June, 2023

MAIGE, J.A.

Before the Court of the Resident Magistrates of Musoma (presided over by Mushi, a Resident Magistrate with extended jurisdiction), the appellant was charged with the offence of murder contrary to section 196 of the Penal Code [Cap. 16, R.E., 2019], (the Penal Code). The particulars of the offence were that on 10th day of August, 2017 (the material time) at

Makorongo village within Rorya District in Mara Region, the appellant murdered one PAULO S/O MADEBE OSAWE (the deceased).

The facts of the case briefly stated are that, the appellant and the deceased were bloodily related in that; the latter was the father of the former. They were, until on the material time, residing at Igelo Hamlet in Makorongo village within the District of Rorya in Mara Region. In between them, there was a dispute on land ownership. Careen Yohana (PW1) as the chairperson of the respective street had undertaken, through his hamlet committee, to reconcile the dispute. The reconciliation which was to be conducted at the *locus in quo* on the material time did not take place as the appellant refused to participate allegedly in fear of the deceased. PW1 testified that, as he was discussing with the deceased on his suggestion that the reason for failure of reconciliation be reduced into writing, the appellant emerged and threatened to cut the secretary of the committee one Florence Alexander Okinga (PW2) with a machete. Soon thereafter, the appellant proceeded where the deceased was and attacked him with a machete on his shoulder and at the back of his head and thus leading to his death. Dr. Mtiba Mkami Nyahucho (PW3) examined the dead body of

the deceased and established as per the PF3(exhibit P2) that the cause of the death was hypovolemic shock secondary to severe bleeding.

The appellant was arrested on 16th August, 2017 at Kogaja village within Rorya District in Mara Region by H. 543 D/C Joel (PW4). Upon investigation being conducted by H. 4590 D/C Greyson (PW5), the appellant was charged.

In his defense, the appellant testified that, on the material time while at home, the appellant and members of the hamlet committee came and took him to a farm which is about 90 meters from his residence. At there, the deceased assisted by the members of the committee started pushing the appellant. The deceased was holding a machete. The appellant testified that, as the deceased was attempting to cut him with the machete, he managed to grab it from his hands and use it to cut the deceased.

As it was the procedure, the trial was conducted with aid of three assessors namely; Ayoub Gitinkwi, Ms. Marcellina Samwel Nyakech and Ms. Ester Nyigega. While the first assessor opined that, the appellant should be convicted of murder, the remaining two assessors were of the opinion that, the killing was without ill intention and, therefore, the appellant

should be convicted of the lesser offence of manslaughter. The trial magistrate with extended jurisdiction having considered the evidence of the eye witnesses (PW1 and PW2) and the circumstances surrounding the killing, was satisfied that, it was with malice aforethought and thus amounted to murder. He, therefore, concurred with one of the assessors and held the appellant culpable of the offence of murder and sentenced him to death by hanging. He did not make any comment in respect to the conflicting opinions of the two remaining assessors.

Being dissatisfied with this decision, the appellant has appealed to the Court. In the initial memorandum of appeal filed on 16th May, 2023 which consisted of four grounds, the appellant faulted the decision of the trial court on the following grounds. **One,** for convicting the appellant basing on weak evidence. **Two**, for not considering the appellant's defense of self-defense. **Three,** for relying on the evidence of PW3 whose statement was not read during the committal proceedings. **Four**, for convicting the appellant based on contradictory evidence. On 18th May, 2023, the appellant filed a written statement of his arguments wherein he raised an additional ground of appeal to the effect that the summing up notes to the assessors were inadequate.

At the hearing, the appellant was represented by Mr. Onyango Otieno, learned advocate while the respondent Republic was represented by Messrs. Tawabu Yahya Issa, Isihaka Ibrahim and Yese Kirita Temba, all learned State Attorneys.

For obvious reason, we invited them to address us on the additional ground of appeal first. Upon hearing of the submissions of both parties, we were satisfied that, the additional ground was by itself capable of disposing of the appeal. The submissions of Mr. Onyango on this point which was supported by Mr. Issa for the respondent Republic was that, the summing up notes by the trial magistrate was inadequate in that; the assessors were not addressed on the vital points of law involved. He submitted that, although whether the killing was intentional or not was seriously contentious, the trial magistrate did not explain to the assessors what amount to malice aforethought. He submitted further that, though it was apparent from the evidence that, the respondent relied on the defense of self-defense, what constitutes such a defense is not in the summing up notes. In his conclusion, therefore, he urged that the proceedings of the trial court be nullified, the conviction quashed and the sentence thereof set aside. On the way forward, Mr. Otieno advocated for a retrial.

Mr. Issa speaking for the respondent Republic while in agreement with the appellant's counsel that the summing up notes were inadequate, he was of the contention that, retrial was not the best way forward. He assigned two reasons to justify his view. **First,** the proceedings constituting the evidence was not affected by the defect in the summing up notes. **Second,** given the fact that the offence was committed more than five years ago, there is a possibility of failure to procure some of the material witnesses and thus leading to failure of justice. Citing the case of **Erick Gabriel Kinyaikya v. R.,** Criminal Appeal No. 104 of 2015 (unreported), the counsel urged the Court to remit the case file to the trial magistrate with extended jurisdiction for preparation of a fresh and proper summing up notes and cause the assessors to opine before composition of a fresh judgment. The option to conduct a fresh trial, he submitted, should come as a last resort in the event that the respective assessors cannot be procured.

In his rejoinder submissions, Mr. Otieno strongly objected the proposal for a fresh summing up. The reason being that, in the third ground of appeal, the testimony of PW3 is challenged for the reason that his substance of evidence was not read out during committal proceedings.

There was also an argument that, the selection of assessors was defective because their age was not stated.

Having exposed the nature of the contention, it may be desirable to consider whether the summing up notes to the assessors were inadequate. We take note that, the trial was conducted way back in 2019 before the changes brought by the Written Laws (Miscellaneous Amendments) Act No. 1 of 2022. Therefore, as per section 265(1) of the Criminal Procedure Act [Cap. 20 R.E. 2019] (the CPA), the trial was to be conducted with the aid of at least two assessors. The position of the law on the procedure of the trial with aid of assessors has not changed. It is such that, before the assessors give their opinions, the trial Judge is obliged to make a summing up notes to them consisting of the substances of the evidence adduced and the vital points of law involved. This is in accordance with 298 of the CPA.

The equity behind the requirement is to enable the assessors to appreciate the types of evidence adduced and the principles of the law controlling the reliability of such evidence so as to be in a position to make a meaningful opinion. This was clearly explained by the defunct Court of Appeal for East Africa in the case of **Washington Odindo v. R** (1954) 21

EACA 392 quoted in **Geofrey Ntapanya and Another v. R,** Criminal Appeal No. 232 of 2019 (unreported) in the following words:

> *"...the opinions of assessors has potential to be of great value where the assessors fully understand the facts of the case before them as it relates to the relevant law. That, where the law is not explained and the assessors are not drawn to salient facts of the case, the value of their opinions is invariably reduced."*

There are numerous pronouncements to the effect that, where in a trial with the aid of assessors there is improper summing up, the same is deemed as a trial without assessors and, therefore, null and void. See for instance, the case of **Said Idd Mshangama @ Senga v. R,** Criminal Appeal No. 8 of 2014 (unreported), where it was stated:

> *"As provided under the law, a trial of murder before the High Court must be with the aid of assessors. One of the basic procedure is that the trial judge must adequately sum up to the said assessors before recording their opinions. Where there is inadequate summing up, non-direction or misdirection on such vital points of law to assessors, it is deemed to be a trial without the aid of assessors and renders the trial a nullity. (see*

Rashid Ally v. Republic, *Criminal Appeal No. 279 of 2010 (unreported)."*

In here, it is apparent that, the trial magistrate did not, as rightly submitted by both counsel, address the assessors in his summing up notes on the elements of the offence involved and of the defense of self-defense on which the appellant placed heavy reliance. On top of that, the trial magistrate with extended jurisdiction departed from the opinions of two of the assessors without assigning reasons therefor as the law requires. The cumulative effect of the irregularities is to render the purported summing up notes, the opinions of the assessors and the judgment of the trial court null and void.

Next for consideration is what should be the appropriate way forward. Mr. Otieno has proposed for retrial whereas his learned friend, Mr. Issa has basically proposed for a fresh summing up notes being prepared by the trial magistrate with extended jurisdiction and a fresh judgment composed after the assessors have given their opinions. To him, retrial should come as a last resort where there is a failure to trace the assessors. We have carefully considered the rival submissions in line with the circumstances surrounding this case. We are of the considered opinion

that, if everything remains constant, the justice of this case requires that, the case file be remitted to the trial court for a fresh summing up and composition of a fresh judgment after receiving informed opinions from the assessors. We have taken that position having satisfied ourselves that, the defect in the summing up notes cannot affect the proceedings prior thereto, including the evidence. The omission to disclose the age of the assessors cannot as well affect the substantial validity of the evidence proceedings because it is curable under the provisions of section 266 (4) of the CPA which provides as follows:

> *"(4) No proceedings shall be invalid only by the reason that any of the assessors was disqualified or exempt from serving as an assessor."*

For the foregoing reasons, therefore, we nullify the purported summing up notes to the assessors and the impugned judgment, quash and set aside the conviction and sentence meted on the appellant. Consequently, we order that the case file be remitted to the learned trial magistrate with extended jurisdiction for preparation of a proper summing up notes and composition of a fresh judgment after receiving informed opinions from the assessors. In the event that, none of the assessors is

procured, retrial by a different trial magistrate with extended jurisdiction shall be conducted as soon as practicable. For the avoidance of doubt, the appellant shall, in the meanwhile remain in custody.

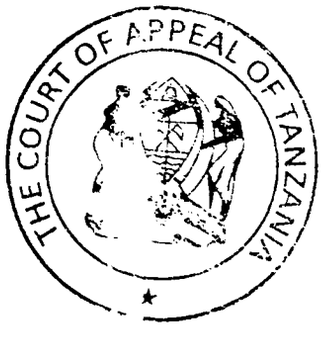
DATED at **MUSOMA** this 1st day of June, 2023.

R. K. MKUYE
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

The Judgment delivered this 2nd day of June, 2023 in the presence of the appellant in person and Ms. Natujwa Bakari, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.



C. M. MAGESA
DEPUTY REGISTRAR
COURT OF APPEAL