IN THE COURT OF APPEAL OF TANZANIA

AT BUKOBA

CORAM: MUGASHA, J.A. KOROSSO, J.A. And KIHWELO, J.A.)

CRIMINAL APPEAL NO. 489 OF 2019

THE DIRECTOR OF PUBLIC PROSECUTIONS..... APPELLANT

VERSUS

MASUMBUKO FREDRICK..... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Bukoba)

(Mtulya, J.)

dated the 16th day of September, 2019

in

Criminal Session Case No. 43 of 2017

RULING OF THE COURT

23rd & 25th November, 2021

MUGASHA, J.A.:

The respondent was charged with murder contrary to section 196 of the Penal Code, [Cap 16 R.E 2002]. It was alleged by the prosecution that, on the 30/5/2015, during morning hours at Mmanyonga -Mkalinzi village within Ngara District in Kagera Region, the appellant did murder one Bennazita w/o Fredrick @ Benadetha w/o Fredrick. He pleaded not guilty to the charge. To establish its case, the prosecution paraded seven (7) witnesses and tendered

in evidence two documentary exhibits namely: the sketch map of the scene of crime (Exhibit P1) and the Postmortem Examination Report (Exhibit P2).

Brief facts underlying the present appeal are such that, the deceased was a step mother of the respondent. On the fateful day, the deceased was at her homestead together with Banyanka s/o Elias, Theopista Francisco (PW2) and Teodora Sprian (PW3) who were assisting the deceased to prepare local liquor. Suddenly, the respondent surfaced, took from his pocket a hammer which he used to strike the deceased on her fore-head and back-head. He then ran away, and those left behind raised an alarm. Since their father was not at the homestead as he had gone to the Centre, PW2 and PW3 rushed thereto to seek assistance but upon returning home, they found the deceased already dead. According to G.3691 DC Felis (PW1), the respondent had a long time misunderstanding with the deceased who was accused of being associated with witchcraft practices and that she was responsible for the death of the respondent's son. Moreover, Jovin Fredrick (PW4) and Julius Mtima (PW5) told the trial court that, the deceased was accused to have killed a number of family members. The fateful incident was reported to the police and subsequently the doctor who examined the deceased body established that death was due to head injury and bleeding.

On his side, the respondent who testified as DW1 stated that, his wife had delivery problems which forced them to see the doctor. He recalled that before delivery of his son, the deceased uttered words *"mtoto wenu mtamu kuliwa".* After the delivery the respondent's son died which made him to be furious and he decided to go and attack the deceased with hammer.

After the summing up to the assessors they all returned a unanimous verdict of guilt of the appellant for the offence of murder. However, the learned trial Judge convicted the appellant with a lesser offence of manslaughter on ground that malice afore thought was not proved because the respondent was provoked by the deceased's utterances prior to the death of his son. Consequently, the appellant was sentenced to a jail term of five years.

Aggrieved, the appellant has filed an appeal to impugn the whole of the said judgment on one ground namely:

1. *That, the Hon. Judge erred in law and facts for finding that the killing of the deceased was done by the respondent without malice aforethought.*

At the hearing of the appeal, the appellant was represented by Ms. Suzan Masule and Ms. Veronica Moshi, both learned State Attorneys whereas the respondent had the services of Mr. Zedy Ally, learned advocate.

With leave of the Court Ms. Masule rose to address that, the assessors were not directed on a point of law during the summing up. To clarify on the point, she submitted that, although the respondent was convicted with manslaughter on ground that he was provoked and malice aforethought was not proved, however, the assessors were not directed on the legal principles on the meaning and reliability of the defence of provocation. In this regard, it was argued that, the trial was not conducted with the aid of assessors and as such, it was vitiated. On the way forward, in order to remedy the omission, the learned State Attorney urged us to invoke revisional jurisdiction under section 4 (2) of the Appellate Jurisdiction Act [CAP 141 R.E 2019] (the AJA). She refrained to press for a retrial and instead, urged us to nullify the impugned judgment, quash and set aside the conviction and sentence and direct the learned trial Judge to make a proper summing up and compose judgment afresh. She argued to have pursued such course because the fateful incident occurred six years ago and it would be difficult to procure

witnesses some of whom are such as the medical doctor and the investigator are public servants who might have shifted to other stations.

On the other hand, although the respondent's counsel had no qualms on the omission to direct assessors on the vital point of law, he urged us to nullify the trial proceedings and judgment and order a retrial before another Judge with a new set of assessors.

Having considered the record before us and the submissions of the respective counsel for either side, the crucial issue for our determination is whether or not the trial was faulty and if so, whether the trial was vitiated and the way forward.

It is not in dispute that, the learned trial Judge relied on the defence of provocation to convict the appellant with the lesser offence of manslaughter. However, during the summing up he did not address the assessors on the meaning and applicability of the defence of provocation. In the circumstances, the question to be addressed is if the trial was conducted with the aid of assessors as envisaged under the provisions of section 265 of the Criminal Procedure Act [CAP 20 R.E. 2019] (the CPA) which stipulates as follows:

"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."

Conducting the trial was in the aid of assessors entails, active involvement of assessors at the trial, summing up the evidence after the conclusion of the trial whereby apart from being appraised with the summary of the evidence of the prosecution and defence, direct them of vital points of law before inviting them to give their opinions on the guilt or otherwise of the accused person.

It is settled law that, where assessors are not directed on a vital point of law, the trial Judge cannot be said to have conducted the trial with the aid of assessors. See: **TULUBUZYA BIJURO VS REPUBLIC** [1992] TLR n 264 whereby the Court having approved the *ratio decidendi* in **BHARAT VS THE QUEEN** [1959] AC 533 held as follows:

"...In a criminal trial in the High Court, where assessors are misdirected ***on a vital point of law, such trial cannot be construed to be a trial with the aid of assessors. The position would be the same where there is a non-direction to assessors on a vital point of law."***

[Emphasis supplied]

Of particular relevance in the present matter, is the case of **ABDALLAH JUMA @ BUPALE** Criminal Appeal No. 557 of 2017 page (unreported) where this Court stated that;

> *"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. "***

[Emphasis supplied]

The essence of explaining the vital points of law to the assessors is crucial because at the summing up, if they fully understand the facts of the case before them in relation to the relevant law their opinion can be of great value and assistance to the trial Judge. If the law is not explained and attention not drawn to the salient facts of the case, the value of assessors' opinion is correspondingly reduced. See: **WASHINGTON ODINDO V. REPUBLIC**, (1954) 21 EACA 392, **MICHAEL KAZANDA @ KAPONDA**

AND 2 OTHERS V. REPUBLIC, Criminal Appeal No. 374 of 2017 and **MBALUSHIMANA JOHN MARIA VIANNEY @ MTOKAMBALI V. REPUBLIC,** Criminal Appeal No. 102 of 2006 (both unreported).

In the present case, as earlier stated, after the close of the defence case, at the summing up, the learned trial judge among other things, addressed the assessors on the meaning of malice aforethought, the only sentence in murder cases and ultimately urged them to be cautious in assisting the Court to meet the ends of justice. Then, the learned trial Judge invited the assessors to give their opinions and they obliged as follows:

"ASSESSORS OPINIONS

1. ***Abel Kambona:*** *My Lord, my opinion is that the accused person killed the deceased person with malice aforethought. He intended for murder. My reasons are very clear;*
   i. *There is distance between his residence and deceased residence;*
   ii. *He carried hammer from his residence;*
   iii. *Evidences of Teopista and Teodora show that the accused person intended to kill by inflicting two blows of hammer to the deceased person; and*

iv. Accused person admitted to blow the deceased person twice.

My Lord, this accused intended to kill the deceased person.

2. *Imelda Nestory*: *My Lord, the accused person did kill with malice aforethought. He did not seek any advice before the killing. This accused person used hammer twice. He intended to kill. He is guilty of murder, as intended to kill.*

3. *Fortunatus Kakwale*: *My Lord, the accused person killed with intention. PW2 and PW3 showed it all and today accused person showed how he prepared to kill:*

i. He prepares hammer to kill;

ii. Distance from his residence to deceased residence;

iii. He inflicted two blows of hammer; and

iv. The accused person escaped.

My Lord, this court must see him with malice aforethought. That is all my Lord.

F.H. Mtulya

Judge

12/09/2019"

From the cited excerpt it can be discerned that all along the assessors were made to understand that, the appellant was charged and tried with the offence of murder and after the summing up, they gave their respective opinions as to the guilt of the appellant. However, with respect, the learned trial Judge in his Judgment shifted goal posts and took a different root having concluded what is reflected at pages 115 and 116 as follows:

> *"I think, to my opinion, in cases, like the present one which invites some doubt, the question should be the extent of sentence and not whether there is malice aforethought....*
>
> *As I stated, the accused in the present case acted suddenly and his conduct clearly showed that he was under stress and senseless.* ***The defence of provocation by witchcraft is availed to the accused person and therefore I cannot enter conviction of murder.***
>
> *Having said the foregoing, I* ***find that the accused person had raised a reasonable doubt in his defence and that the prosecution side has not proved beyond reasonable doubt that the accused person killed the deceased person with malice aforethought. I think there is no***

sufficient evidence to establish malice aforethought. I therefore convict the accused person of a lesser offence of manslaughter."

[Emphasis supplied]

In the light of the bolded expression, as earlier stated the appellant's conviction with the lesser offence of manslaughter and underlying defence of provocation was not known to the assessors who had a duty of aiding the trial Judge in the respective criminal trial. It was incumbent on the trial Judge during the summing up to explain to the assessors the meaning and applicability of the defence of provocation *vis a vis* malice aforethought before inviting the assessors to give their opinions. This was not the case. The omission vitiated the trial and it cannot be safely vouched that the trial was conducted with the aid of assessors. This is in violation of the dictates of the provisions of section 265 of the CPA.

In determining the way forward, we are aware of the principle that each case must be decided on the basis of its own peculiar facts. All factors taken into account, we are inclined to lean on the facts presented to us by Ms. Masule on the challenges surrounding a repeated trial. These include but not limited to the difficulty to procure witnesses to testify at the fresh trial as

some of those witnesses such as, the medical Doctor and the investigator being public servants which at the end by and large places the trial in jeopardy and the ends of justice cannot be achieved. We have also seriously considered that, unlike in some other cases, in this case, the omission relates to only non-direction of assessors on a vital point of law at the summing. Thus, there is no such a serious issue warranting a retrial. We are satisfied that the course we are about to take will not occasion a failure of justice in the light of what we observed in the case of **MARKO PATRICK NZUMILA AND ANOTHER VS REPUBLIC,** Criminal Appeal No. 141 of 2010 (unreported), as follows:

> *"Failure of justice or (sometimes, referred to as miscarriage of justice) has, in more than one occasion been held to happened where an accused person is denied an opportunity of an acquittal (See for instance **WILLBARD KIMANGO vs 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 safe to err in acquitting than 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."

The said decision was followed by the Court in the recent case of **MASHAKA ATHUMANI @ MAKAMBA VS REPUBLIC**, Criminal Appeal No. 107 of 2020 (unreported) whereby having considered the peculiar circumstances obtaining in the case we stated as follows:

"... We quash the proceedings of the trial court from the stage of 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 before the same set for assessors from which they can give their opinions before composing judgment afresh in accordance with the law..."

The said path suffices in the present case given the circumstances which would occasion a failure of justice if witnesses are not procured to attend and testify at the trial. In the premises, we invoke the revisional jurisdiction under section 4 (2) of the AJA and hereby quash and set aside the conviction and sentence, nullify the summing up proceedings and direct the learned

trial judge to prepare fresh and proper summing up notes containing all the prerequisites, sum up to the assessors and require them to give their opinion before composing judgment afresh. Meanwhile the respondent should remain in custody.

DATED at **BUKOBA** this 25th day of November, 2021.

S. E. A. MUGASHA
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

The ruling delivered this 25th day of November, 2021 in the presence of Mr. Juma Mahona, learned State Attorney for the appellant/DPP and respondent appeared in person, is hereby certified as a true copy of the original.

B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL