IN THE COURT OF APPEAL OF TANZANIA
AT ZANZIBAR

(CORAM: LUBUVA, J.A., MROSO, J.A. AND MSOFFE, J.A.)

CRIMINAL APPEAL NO. 1 OF 2004

BETWEEN

KHAMIS NASSOR SHOMAR ..... APPELLANT

AND

S.M.Z. ..... RESPONDENT

(Appeal from the conviction and sentence of the High Court for Zanzibar at Vuga)

(Mshibe J.)

Dated the 17th day of April, 2003
in
Criminal Session case No. 19 of 2001

JUDGMENT OF THE COURT

LUBUVA, J.A.:

This is an appeal against the decision of the High Court of Zanzibar, Mshibe, J. in Criminal Sessions Case No. 19 of 2001. The appellant was charged with and convicted of the offence of manslaughter contrary to sections 179 and 182 of the Penal Decree, Chapter 13 of the Laws of Zanzibar.

Briefly stated, the case against the appellant, a soldier with the Tanzania People's Defences Forces in Zanzibar, was as follows: On 23.12.1997, the appellant together with other soldiers, PW1, PW3, PW4, PW5, PW6 and PW7, were on duty at Fumba taking charge of the security of TANESCO installation. At about 8p.m., the deceased, Claudius Karl, visited the TANESCO installation area riding a motor cycle. He was suspected as a security risk to the TANESCO electricity installation. The appellant and his companions, confronted the deceased who was not armed. As the deceased was running away to save his life, the appellant fired a shot at the deceased who fell down dead.

In his defence at the trial, the appellant denied aiming the gun at the deceased. Instead, he claimed to have fired the gun twice in the air to scare the deceased. Unfortunately, the deceased was shot on the right side of the neck. The trial court found as a fact that the appellant had

without intention caused the death of the deceased. As observed earlier, the appellant was convicted of manslaughter and was sentenced to five (5) years imprisonment. This appeal has been preferred against the decision of the High Court.

Lt. Col. Laizer, learned counsel, advocated for the appellant before us in this appeal. On the other hand, Mr. Ali A. Hassan, learned State Attorney, represented the respondent, the Revolutionary Government of Zanzibar. At the commencement of hearing the appeal, at the prompting of the court, two issues were raised and argued as preliminary matters. These relate first to the summing up of the evidence to the assessors and their opinion. Second, the propriety of transferring the case from one judge to another.

We shall first deal with the summing up of the case to the assessors. From the record, it is clear that on 8.4.2002, when the trial commenced before Dourado, J. three assessors were selected namely Ali Ramadhani Ali, Abdulla Ali and Mwadini Makungu. However, it is also apparent from the record that at the close of the case for both sides, it is not indicated that the learned trial judge either summed up the case to the assessors or required the assessors to state their opinion.

In this regard, the issue is the legal effect of the trial judge's failure to sum up the case to the assessors and obtain their opinion. On this, Mr. Ali A. Hassan, learned State Attorney, for the respondent, the Revolutionary Government of Zanzibar, stated that in terms of the provisions of section 256(1) of the Criminal Procedure Decree, Chapter 14 of the Laws of Zanzibar, (hereinafter referred to as the Decree) it is not mandatory for the trial

judge to sum up the case to the assessors and require them to state their opinion. Stated differently, he said it is a matter of discretion on the part of the trial judge to do so. He however conceded that this interpretation of section 256(1) of the Decree negates the import and the logic behind the provisions of section 220 of the Decree which provides that all trials before the High Court shall be with the aid assessors.

On his part, Lt. Col. Laizer, learned counsel, firmly contended that as section 220 of the Decree provides in mandatory terms for the High Court to sit with assessors during trial, the discretionary provisions of section 256(1) should be applied such that the provisions of section 220 are not negated. He urged the court to quash and set aside the decision of the High Court, remit the matter to the High Court with direction to deal with the matter in accordance with the law.

With regard to the role of assessors in trials before the High Court, the pertinent issue is whether the judge's summing up of the case to the assessors is mandatory or discretionary. This aspect has engaged our minds considerably. Section 256(1) of the Decree provides:-

> 256(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 and shall record such opinion (underlining supplied).

From the provisions of this section, we are in agreement with Mr. Ali A. Hassan, learned State Attorney, that the judge's summing up of the case to the assessors is discretionary and not mandatory. The wording of the section is

unambiguously clear where the operative word used is "may". However, we wish to point out at once that although it is not mandatory for the trial judge to sum up the case to the assessors, as a matter of long established practice, trial judges sitting with assessors have invariably been summing up the cases to the assessors.

That that is the practice can be seen from a number of decided cases by this Court in Tanzania and elsewhere in East Africa by the Court of Appeal for East Africa. In Tanzania Mainland, section 265 of the Criminal Procedure Act, 1985 (the Act) essentially provides in similar terms as section 256 (1) of the Decree, in Zanzibar. It provides:

> 298(1) -When the case on both sides is closed, the judge <u>may</u> 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 shall record such opinion (underlining supplied).

As said before, with such similarly worded provision of the law in Tanzania Mainland, in **Hatibu Gandhi v Republic** (1996) TLR. 12, the court took the view that although the trial judge's summing up of the case to the assessors is discretionary, as a matter of practice, it is prudent for the judge to sum up the case. In part, the court held:

> The word 'may' in section 283 (1) of the Criminal Procedure Code (now section 298(1) of the Criminal Procedure Act, 1985) is unambiguous and crystal clear; and thus the trial judge's summing (sic) of the case to his assessors is not

mandatory, but is prudent as a matter of practice.

It is our view that this view is in accord with logic and the spirit behind the provisions of section 265 of the Act in Tanzania Mainland. It provides that:

> All trials before the High Court shall be with aid of assessors the number of whom shall be two or more as the court thinks fit.

In our view, to hold otherwise, would negate the import of this very clear and mandatory provision of the section. As correctly submitted by Lt. Col. Laizer, learned counsel for the appellant, it would otherwise make a mockery of the provisions of section 265(1) of the Act, if the practice of the court was different from what was stated in **Hatibu Gandhi** (supra).

In **Stanley Anthony Mrema v Republic**, Criminal Appeal No. 60 of 2000 (unreported) this Court reiterated the position of the law regarding summing up of the case to the assessors applicable in Tanzania, In that case, the Principal Resident Magistrate in exercise of extended jurisdiction, did not properly sum up the case and direct the assessors on the applicable law in the circumstances of the case. Allowing the appeal and ordering the case to be heard de novo, the court reaffirmed the views expressed by the Court of Appeal for Eastern Africa in **Washington s/o Odindo v R** (1954) 21 EACA 392 which was also followed in **Andrea And Others v R** (1958) EA 684. The Court of Appeal for Eastern Africa inter alia stated:

> The opinion of assessors can be of great value and assistance to a trial judge but only if they fully understand the facts of the case before them in relation to the relevant law. If the law is

not explained and attention not drawn to the salient facts of the case, the value of the assessors' opinion is correspondingly reduced.

What is the legal position in Zanzibar, where, as already indicated, the provisions of sections 220 and 256 (1) of the Decree are in essence similarly worded as sections 265 and 298(1) of the Criminal Procedure Act, 1985 in Tanzania Mainland regarding trials with assessors and summing of the case. In our view, having regard to the essence and similarity in these provisions, we do not think that there is any rational or legal ground for taking a different view of the import and logic behind these provisions in Zanzibar. We are firmly of the view that the logic behind these provisions are essentially the same. We think by parity of reasoning, the same view taken by this Court and its predecessor, the Court of Appeal for East Africa in the above cases would hold true of Zanzibar.

Based on established practice and decided cases, in **Stanley Anthony Mrema** (supra), where the trial Principal Resident Magistrate (Ext. J.) had not properly directed the assessors in the summing up, this Court took the view that it was not certain what the verdict would have been if the assessors had been properly directed. In the instant case, we think the situation is even worse. There was no summing up at all to the assessors and their opinion was not taken. In **Hatibu Gandhi** (supra) the court also held:

> Section 248 of the Criminal Procedure Code (now section 265 of the Criminal Procedure Act, 1985) obliges the trial judge, by necessary implication, to take the assessors opinion before giving judgment.

As there was no summing up of the case to the assessors and their opinion was not taken, in similar vein, we are satisfied that the proceedings were in contravention of the clear and long established practice of the court.

Although this ground is sufficient to dispose of the appeal, there is yet another aspect of the matter. This we intend to deal with briefly. The issue relates to the changing of judges in the trial of the case. From the record, it is apparent that Dourado, J. conducted the trial of the case from the commencement of hearing of the case until the close of the prosecution case. On the submission of no case to answer, the trial judge, ruled that the accused, the appellant in this case had a case to answer. On 26.7.2002, Dourado, J. instructed one Luciano, apparently, a court clerk to submit the court record to the Chief Justice for re-assignment to another judge. The record was reallocated to Dahoma, J. on 29/7/2002 by the Deputy Chief Justice. On

14.8.2002, Dahoma, J. reallocated the case to Mshibe, J. It is further apparent that in all the orders for reallocation, no reason was ascribed to explain the reason for the transfer of the case.

As to the propriety of such transfer of the case, Mr. Ali A. Hassan, learned State Attorney, said it was his view that the Criminal Procedure Decree does not provide for such a situation. He however pointed out that Article 95(3) of the Zanzibar Constitution 1984, provides to the effect that in the event a Judge of the High Court of Zanzibar reaches the retirement age, he shall continue holding the office of a judge until such a time that he concludes the cases assigned to him before reaching the retirement age. In this case, he conceded that if the transfer of the case was due to Dourado, J's. retirement, the re-assignment was improper.

Ltd. Col. Laizer urged that as no reason was given for the transfer of the case it is a matter of conjecture why the case was transferred. On the other hand he said if the transfer was due to Dourado, J's retirement, it was improper because Article 95(3) of the Zanzibar, 1984 constitution provides for such an eventuality. In the circumstances, Lt. Col. Laizer maintained that the appellant was prejudiced by the transfer of the case to other judges at a stage when the initial trial judge, Dourado, J. had seen and heard the witnesses until the close of the prosecution case. For unexplained reasons, the transfer of the case to other judges at that stage, counsel further submitted, was not only improper, but also prejudiced the appellant.

We have no hesitation in agreeing with learned counsel for both parties that no reason was shown in the record for the transfer of the case from one judge to another. As happened in this case, it is a matter for conjecture why it

was done. If, as the learned State Attorney submitted, the law under the Criminal Procedure Decree in Zanzibar is silent on the transfer of cases from one judge to another, it is, to say the least, a very unsatisfactory state of affairs. Properly laid down procedure should be provided in the law to take care of deserving situations warranting such transfer of cases.

Otherwise it would be a chaotic situation whereby judges or other judicial officers for unexplained reasons may transfer cases indiscriminately. At any rate, in order to ensure that there is some semblance of orderliness, apart from giving reasons for the transfer of cases where necessary, such transfer of cases in the High Court should be effected by the Chief Justice or Judge In-charge and not at the whim of any judge as happened in this case.

On the other hand, in this case, if the transfer of the case was due to Dourado, J. retirement, it was, as conceded

by counsel for both parties improper. This is so because Article 95(3) of the Zanzibar Constitution, 1984, takes care of such a situation. Dourado, J. would have continued to hear the case until its conclusion. As happened in this case, having regard to the fact that the case had reached the stage of closing the prosecution case Dourado, J. had ruled that the appellant had a case to answer and the fact that no reason was given for the transfer, it may well be that the appellant was prejudiced by the transfer of the case as urged by learned counsel, Lt. Col. Laizer.

For the foregoing reasons, the appeal is allowed, conviction quashed and sentence set aside. It is further ordered that the case is to be remitted to the High Court for re-trial by another judge according to the law. Having taken this view, it becomes unnecessary for the court to deal with other grounds of appeal raised.

DATED at ZANZIBAR this 26th day of November, 2004.

D. Z. LUBUVA
JUSTICE OF APPEAL

J.A. MROSO
JUSTICE OF APPEAL

J. H. MSOFFE
JUSTICE OF APPEAL

I certify that this is a true copy of the original.



S. M. RUMANYIKA
DEPUTY REGISTRAR