CRIMINAL APPEAL NO. 216 OF 2007- COURT OF APPEAL OF TANZANIA AT ARUSHA- MROSO, J.A., KAJI, J.A. And RUTAKANGWA, J.A.	**JOHN MLAY Vs. REPUBLIC (Appeal from a conviction of the High Court of Tanzania at Moshi)-_Criminal Sessions Case No. 43 of 1996 -Mushi, J.**	Offence of murder, contrary to section 196 of the Penal Code, Cap. 16- **Summing up to assessors- Section 298 (1) of the Criminal Procedure Act, 1985-** Summing up to assessors is not mandatory as provided for under section 298 (1) of the Act. **Purpose of Summing up to assessors- Section 298 (1) of the Criminal Procedure Act, 1985-** The purpose of summing up to assessors is to enable the assessors to arrive at a correct opinion. **Summing up to assessors- Section 298 (1) of the Criminal Procedure Act, 1985-The Summing up, however brief –** must touch on all

		essential elements of the offence of murder. The notes must make reference to the charge of murder facing the accused person and must explain what Murder is. The summing up must make reference to the burden of proof, that it is the duty of the prosecution to prove the offence charged beyond all reasonable doubt, elaborate on the cause of death. Other matters included in the summing up are main issues and the issue of credibility of witnesses.- At any rate summing up is a matter of style whether it should be short and precise or lengthy and exhaustive.

IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: MROSO, J.A., KAJI, J.A. And RUTAKANGWA, J.A.)

CRIMINAL APPEAL NO. 216 OF 2007

JOHN MLAY ..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from a conviction of the High Court of Tanzania at Moshi)

(Mushi, J.)

dated the 20th day of July, 1999
in
Criminal Sessions Case No. 43 of 1996

JUDGMENT OF THE COURT

4 & 23 October, 2007

KAJI, J.A.:

The appellant, John Mlay, was charged with and convicted of the offence of murder, contrary to section 196 of the Penal Code, Cap. 16, in Criminal Sessions No. 43 of 1996 in the High Court at Moshi (Mushi, J. as he then was). He was sentenced to suffer death by hanging.

The facts giving rise to this appeal may briefly be stated as follows:-

The deceased James John and the appellant were son and father respectively. There was a time each of them bought a piece of land from Thomas Maiba, and each built his house in the piece he had purchased. Their houses were close to each other but were separated by a path.

However there was a small portion of land which each of them was claiming to be his and to have purchased from the said Thomas Maiba. That portion was right in front of the deceased's house. The appellant and the deceased were quarrelling over ownership of that parcel of land. Eventually it was resolved that the deceased should refund the appellant Shs. 4,000/= which the appellant had claimed to have paid to Thomas Maiba for the purchase of that piece of land. The appellant demanded that money and the deceased promised to pay later as by then he said he had no money. It would appear the appellant kept on reminding the deceased to refund the money and the deceased kept on promising to pay later. Eventually the deceased's younger brother, one Joseph John, paid the appellant

Shs. 2,000/= on behalf of the deceased, and the deceased's mother, the appellant's wife, Leonsia w/o John (PW4) promised to pay the remaining Shs. 2,000/=. But on 7th October, 1995 the appellant started demanding furiously the refund of the 4,000 shillings from the deceased. The appellant dug a trench near the door of the deceased's house and removed the planks *(mabanzi)* which the deceased had used in fencing his house. The appellant heaped the planks and some broken bricks on the door of the deceased's house, apparently to prevent the deceased from entering his house. A neighbour, Emil Lello Malya (PW3) beseeched the appellant not to do so and that they would call elders the following day for reconciliation. The appellant assured PW3 that he would abide his advice and wait for a reconciliation by elders the following day. However the appellant did not honour his words. He killed the deceased by stabbing him with a knife almost immediately after assuring PW3 that he would wait for the elders' reconciliation the next day. It was the prosecution's submission that the killing was with malice aforethought and therefore murder. But it was the appellant's defence that the killing was accidental. The learned trial judge held

the killing to have been premeditated/with malice aforethought and convicted the appellant of murder.

The appellant was aggrieved. He lodged this appeal through the legal services of Mr. Maro, learned counsel, who preferred three grounds of appeal. However at the hearing of the appeal the learned counsel abandoned ground No. 3. He categorized the first ground of appeal as a point of correction of the record and for proper guidance. That ground referred to failure by the learned trial judge to afford the appellant opportunity to object to the assessors. The learned counsel made that decision after consulting the appellant who told him he would not have objected to any even if he would have been afforded that opportunity. Thus the learned counsel argued only ground No. 2 which reads:-

> *The trial court erred in failing to prepare and record elaborate notes of the summing up and directions to the assessors.*

Elaborating on the point, the learned counsel contended that section 265 of the Criminal Procedure Act, 1985 (the Act) requires all trials in

the High Court to be with the aid of assessors. In the instant case the learned counsel held the view that the trial of the appellant was without the aid of assessors. The learned counsel held this view following failure by the learned trial judge to write an elaborate sum up to the assessors with clear directions to them on vital points. The learned counsel conceded that the learned trial judge made a brief sum up to the assessors in a form of brief notes. But he was of the view that the brief notes were not elaborate enough to enable the assessors to understand the gist of the case and give a correct opinion. The learned counsel cited A.I.R. Commentaries: ***The Code of Criminal Procedure Act No. V of 1888 by D. V. Chitaley & S – APPU Rao, Volume 11, 6th Edition, All Indian reports LTD, Nagpur 1965*** with emphasis on sections 294, 295, 296 and 297 at pages 2055, 2056, 2060, 2069 and 2075 which provide that, ***the trial judge must fully sum up the prosecution and defence evidence to the jurors so that they may give a correct opinion.*** However the learned counsel conceded that, in India, in a trial by jury, the jurors are the sole judges of all questions of fact; and their verdict on questions of fact cannot be set aside on appeal.

The learned counsel pointed out that, although under section 298 (1) of the Criminal Procedure Act Cap. 20 R.E. 2002 the judge is not bound to sum up the evidence for prosecution and the defence, yet it has been a practice that trial judges do sum up at length to enable the assessors to arrive at a correct decision. The learned counsel asserted that, all this is to ensure that the trial has been with the aid of assessors.

The learned counsel argued that, in the instant case the omission to sum up the evidence at length was a mistrial which rendered the whole proceedings a nullity, and that a retrial should be ordered.

On his part, Mr. Boniface, learned Senior State Attorney, who represented the respondent Republic at the hearing of this appeal, resisted the appeal on the ground that the brief notes by the learned trial judge amounted to summing up to assessors because all essential points were covered. The learned Senior State Attorney challenged the learned counsel for the appellant to point out which vital points the learned judge had omitted since the learned counsel had not mentioned any. The learned Senior State Attorney distinguished between section 297 of the Indian Criminal Procedure

Code and section 298 (1) of our Criminal Procedure Act. He said, whereas under the Indian provision (section 297) summing up to the jurors is mandatory, under our provision (section 298 (1)) summing up is discretionary.

The learned Senior State Attorney conceded that, it has been a practice that trial judges sum up at length and require assessors to give their opinion as required by section 298 (1) of the Act. But he pointed out that under section 298 (2) of the Act, trial judges are not bound by the opinion of assessors. The learned Senior State Attorney concluded by submitting that, in the instant case, summing up was done. Only elaboration was missing which, in his view, is curable under section 388 of the Act.

In a brief rejoinder, Mr. Maro insisted that the point here is trial with the aid of assessors as required by section 265, and that, in his view, in the instant case, the trial was without the aid of assessors which is a serious error which cannot be cured by section 388. The learned counsel was also not happy with the manner in which the learned trial judge required the assessors to give their opinion when he asked them whether the offence amounted to murder or

manslaughter whereby they unanimously said it was murder, without giving any reason.

On our part we have carefully considered the rival submissions by counsel. Also we have carefully perused the brief notes by the learned judge. As correctly pointed out by the learned counsel for the appellant and the learned Senior State Attorney, summing up to assessors is not mandatory as provided for under section 298 (1) of the Act.

A complaint on inadequate summing up is not new in the Court. In the case of **Hatibu Gandhi and Others** v **R** (1996) TLR 12, the appellant's advocate Mr. Jadeja raised a complaint against the trial judge that the learned trial judge had failed to make adequate summing up of the case to the assessors. The Court had this to say at page 36:-

> We cannot interpret the word ***"may"*** used under section 283 (1) of the Criminal Procedure Code (now section 298 (1) of the Criminal Procedure Act, 1985) to mean ***"shall".*** To do so would be to do violence to clear statutory provisions.

Therefore, the question whether summing up to assessors is mandatory is no longer an issue in this Court. The answer is very clear. But we may go further and ask: What is the purpose of summing up to assessors? The answer is also clear. The purpose of summing up to assessors is to enable the assessors to arrive at a correct opinion. In the instant case the crucial issue is whether the impugned brief notes were of the kind that could have served the above purpose, and whether they served it.

In our view, we think, the answer is in the affirmative. We say so for the following reasons. Going through the notes, it is apparent to us that the learned trial judge touched on almost all essential elements of the offence of murder. The notes suggest that the learned judge made reference to the charge of murder facing the appellant and explained what is murder. He made reference to the burden of proof, that it is the duty of the prosecution to prove the offence charged beyond all reasonable doubt as reflected in item 2. He elaborated on the cause of death in item 3. He reminded the assessors that the appellant had admitted to have unlawfully caused the death of the deceased and he told them the difference between

unlawful killing which may be manslaughter and murder as reflected in item 3 (ii). The learned judge did not end there. He went further and told them what the main issue in the case was, and the issue of credibility as reflected in item 4. The learned judge hinted also on the appellant's explanation on how the deceased got injured together with other essential elements as can be seen on pages 21 and 22 of the record. Finally, he asked them whether, according to the evidence, the offence proved was murder or manslaughter. We see nothing wrong with this procedure. There were only two categories of killing at issue, that is, unlawful, willful, and with malice aforethought and therefore murder as propounded by the prosecution, or accidental killing as pleaded by the appellant. Therefore, there was nothing wrong with the learned judge in asking them whether, according to the evidence, the offence proved was murder or manslaughter.

All three assessors gave a unanimous opinion that the appellant was guilty of murder. They did not give reason. But we could not come across a provision in the Act requiring assessors to give reasons for their opinion, and the learned appellant's counsel could not cite any.

We are mindful of some authorities cited by the learned counsel. But, with due respect to the learned counsel, we think they are distinguishable from the case. For instance, in the case of **Bharat** v **The Queen** (1959) AC 533, the trial judge in summing up to assessors misdirected them on the defence of self defence and provocation which was held to be a fatal error. In the instant case, there is nothing suggesting that the learned judge, in his brief notes, misdirected the assessors on anything, and the learned counsel did not mention any.

In **Tulubuzya Bituro** v **R** (1982) TLR 264, the trial judge in summing up to the assessors misdirected them on the issue of provocation. The error was held to be fatal which vitiated the entire proceedings. There is nothing of the kind in the instant case.

Another case cited by the learned counsel is that of **Jesinala Malamula** v **R** (1993) TLR 197 at pages 200 – 201. In summing up the trial judge who had found that there was provocation, removed the question of provocation from the assessors and decided it on his own. The Court held that to remove the question of provocation from the assessors when there is such provocation is fatal to the

resulting conviction, for it is impossible to know what the assessors would have said had the question been put to them. In the instant case there is nothing suggesting anything of the sort.

According to all that we have stated above, we acknowledge that the notes were sketchy, but they contained all essential elements of the case. We are not saying it was the best mode of summing up to assessors. What we are saying is that it served the purpose for which summing up is. At any rate, we think, summing up is a matter of style whether it should be short and precise or lengthy and exhaustive. There is nothing suggesting that there was miscarriage of justice or that the appellant was prejudiced. Also we are not aware of any provision in our Criminal Procedure Act requiring elaborate summing up. Going through the record, it is apparent that, during the trial, the assessors asked questions to the prosecution witnesses and the appellant. After summing up, they gave their opinion as required by section 298 (1) of the Act. We therefore do not agree with the learned counsel for the appellant that the trial was without the aid of assessors. We are satisfied that it was with the aid of assessors for the reasons stated above.

In the event, and for the reasons stated above, we dismiss the appeal in its entirety.

DATED at ARUSHA this 23rd day of October, 2007.

J. A. MROSO
JUSTICE OF APPEAL

S. N. KAJI
JUSTICE OF APPEAL

E. M. K. RUTAKANGWA
JUSTICE OF APPEAL

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

I. P. Kitusi
DEPUTY REGISTRAR