IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: MSOFFE, J.A., MBAROUK, J.A. And BWANA, J.A.)

CRIMINAL APPEAL NO. 18 OF 2006

MARIA PASKALI ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Conviction of the High Court of Tanzania at Karagwe)

(Luanda, J.)

dated the 8th day of November, 2005
in
Criminal Sessions Case No. 73 of 2002

JUDGMENT OF THE COURT

5 & 10 May, 2010

MBAROUK, J.A.:

The appellant, Maria Paskali, was convicted of the offence of murder contrary to Section 196 of the Penal Code, and sentenced to suffer death by hanging by the High Court of Tanzania at Karagwe (Luanda, J. as he then was) on 8-11-2005. Undaunted, she has preferred this appeal.

Briefly stated, the facts of the case are as follows: On 6-9-1998 around 9.00 p.m. at the homestead of Paskali s/o Kasika (the

deceased) Fidel Apolinary (PW1) and Simon Apolinary (PW2) were drinking a local brew known as *"rubisi"*. The appellant happened to be around, and she also took the liquor. Thereafter, the appellant served food to PW1, PW2, the deceased, and three children. There was a bowl of cassava meal *(ugali)* and each had a bowl of beans mixed with groundnuts. The appellant did not eat after having complained that she was not feeling well, suffering from stomach upset. When the deceased ate the third cut *(tonge)* of cassava meal he bent down and vomited heavily. He then fell down. All present stopped eating and the appellant took the leftovers and went inside her room. Thereafter two medicinemen and four kinsmates were called for help. One mediceneman arrived and performed his "healing power", but this did not help. At around 10.00 a.m. the following day, the deceased passed away. People started searching the house premises and saw the leftovers at the banana stem covered with banana peels. On removing the leftovers, they saw dead flies. Later on with the help of Dionic Bernard (PW3) the appellant confessed that she poisoned the food. She then sent the people to the place where the poison was kept, near a toilet. Thereafter, the appellant was arrested and sent to Kyabalisa Police Station and accordingly charged.

In this appeal, the appellant is represented by Mr. P. Rugaimukamu, learned advocate, whereas the respondent Republic had the services of Mr. Seth Mkemwa, learned State Attorney.

Mr. Rugaimukamu lodged a memorandum of appeal containing four grounds of appeal. However, at the hearing he abandoned ground No. 4. In essence only two main grounds have been the subject of argument in this appeal, namely:-

1. *That the trial court erred in law by commencing the trial without the Assessors at the preliminary hearing, and*
2. *That no fair trial and hearing was extended to the Appellant because of the trial court failure to comply with the mandatory provisions of Section 393 (2) of Cap. 20 Revised Edition 2002.*

As for the 1st ground of appeal, Mr. Rugaimukamu submitted that the absence of assessors at the preliminary hearing affected his client (the appellant). He added that, even if Section 192 of the Criminal Procedure Act (Cap. 20 R.E. 2002) (the Act) is silent on the presence of the assessors at a preliminary hearing, but that might be a slip in that provision of the law. He further submitted that, the preliminary

hearing is part and parcel of the trial, hence forms the basis of a case. He then referred us to the decision of this Court in **Hamis Mchachari v Republic,** Criminal Appeal No. 205 of 2008 (unreported). Mr. Rugaimukamu emphatically submitted that as facts of the case begin at the preliminary level of the case, hence urged us to hold that assessors have to be present at the stage of a preliminary hearing. However, in the end Mr. Rugaimukamu did not cite any legal authority in support of his contention.

On his part, Mr. Mkemwa, briefly and concisely conceded that in the instant case there were no assessors at the preliminary hearing. But, he said this was in compliance with **Section 192 of the Act**, which does not state the requirement of having assessors at the preliminary hearing. Mr. Mkemwa added that in practice before resuming the hearing of the main trial, a State Attorney in his opening address/speech states all the facts in the presence of the assessors. Hence at that stage the assessors will hear all the facts in that case. For that reason, he urged us to find that the 1st ground of complaint has no merit.

We fully agree with Mr. Mkemwa that **Section 192 of the Act** is silent on the necessity of a preliminary hearing before the High Court being conducted with the aid of assessors. The reality is that **Section 192 (1) of the Act** states as follows:-

> **Section 192 (1)**
>
> *"Notwithstanding the provisions of Section 229,* ***if an accused person pleads not guilty the court shall as soon as is convenient, hold a preliminary hearing in open court in the presence of the accused or his advocate (if he is represented by an advocate) and the public prosecutor*** *to consider such matters as are not in dispute between the parties and which will promote a fair and expeditious trial."*
>
> (Emphasis added).

Apart from that **Section 192** does not state that a preliminary hearing should be conducted with the aid of assessors. We see nothing unusual, and we agree with Mr. Mkemwa that if assessors are to help the court in assessing the facts of the case, there will be no effect inflicted to the accused person, because in practice all facts are

stated at the opening speech/address before the main trial begins. With the spirit of accelerating trials, we are of the considered opinion that introducing assessors at the preliminary hearing will be time consuming. In the event, and for the reasons stated herein, we are of the considered opinion that the 1st ground of appeal has no merit.

As to the 2nd ground of appeal, Mr. Rugaimukamu, was of the view that non compliance with **Section 293 (2)** of the Criminal Procedure Act led the appellant not to be accorded with a fair trial. He added that the appellant was denied of her right to defend. In support of his argument he cited to us the decision of this Court in **MT.7479 Sgt Benjamin Holela v Republic** [1992] TLR 121 and **Alex John v Republic**, Criminal Appeal No. 129 of 2006 (unreported). He submitted that, the record shows that at the close of the prosecution case on 25-10-2005, the trial Judge failed to inform the appellant of her rights in accordance with **Section 293 (2) of the Act**. For those defects he pointed out, Mr. Rugaimukamu then prayed for the appellant to be released and set free and vacate the decision of the High Court.

On his part, Mr. Mkemwa without any delay agreed that, it is true the trial judge at the High Court did not comply with the mandatory requirements stated in **Section 293 (2) of the Act**. He added that, the effect of such non-compliance is that the appellant was denied of her right to defend herself. In the result, Mr. Mkemwa urged the Court to invoke **Section 4 (2) of the Appellate Jurisdiction Act** and exercise its revisional jurisdiction and quash and set aside the proceedings of the case as from 25-10-2005 onwards.

There is no doubt that the record of the proceedings of the case at the trial court shows that the High Court Judge did not comply with **Section 293 (2)** of the **Act**. Both, Mr. Rugaimukamu and Mr. Mkemwa admit that the appellant was not informed of her right under the above stated mandatory provision of the law. **Section 293 (2)** reads as follows:-

> *"When the evidence of the witnesses for the prosecution has been concluded and the statement, if any, of the accused person before the committing court has been given in evidence, the court, if it considers that there is evidence that the accused person committed*

the offence or any other offence of which, under the provisions of section 300 to 309 he is liable to be convicted, ***shall inform the accused person of his right*** –

(a) ***to give evidence on his own behalf; and***

(b) ***to call witnesses in his defence***

and shall then ask the accused person or his advocate if it is intended to exercise any of those rights and record the answer; and thereafter the court shall call on the accused person to enter on his defence save where he does not wish to exercise either of those rights."
(Emphasis added).

Section 293 (2) of the **Act** clearly shows that it is couched in mandatory terms. The word **"shall"** has been repeatedly stated therein. Surely, the High Court Judge as per the record of proceeding did not inform the appellant/accused of his right as stated in **Section 293 (2)** of the **Act**.

For the reasons stated herein above, we are hereby constrained to exercise our revisional jurisdiction under **Section 4 (2)** of the **Appellate Jurisdiction Act, 1979** as amended by Act No. 17 of 1993. In the event, we quash and set aside the proceedings which appeared after the prosecution closed its case on 25-10-2005. In this regard see also the decision of this Court in **Melkizedeki Mkuta v Republic**, Criminal Appeal No. 17 of 2006 (unreported).

In addition to that, the High Court is directed to reconstitute itself and proceed from where the prosecution case was closed on 25-10-2005. It is so ordered.

DATED at MWANZA this 7th day of May, 2010.

J. H. MSOFFE
JUSTICE OF APPEAL

M. S. MBAROUK
JUSTICE OF APPEAL

S. J. BWANA
JUSTICE OF APPEAL

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

THE COURT OF APPEAL OF TANZANIA

(J. S. MGETTA)
DEPUTY REGISTRAR