IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

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

CRIMINAL APPEAL NO. 17 OF 2006

MELKIZEDEKI MKUTA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Conviction and Sentence of the High Court of Tanzania at Bukoba)

(Luanda, J.)

dated the 15th day of November, 2005
in
Criminal Sessions Case No. 74 of 2002

JUDGMENT OF THE COURT

4 & 7 May, 2010

MSOFFE, J.A.:

The appellant was sentenced to death by the High Court (Luanda, J. as he then was) consequent upon his conviction of the murder of Yakubu Swalehe on or about the 12th day of August 1999 at Nkwenda village within the District of Karagwe in Kagera Region. He is dissatisfied, hence this appeal. He is advocated for by Mr. Constantine Mutalemwa, learned counsel, while the respondent Republic had the services of Mr. Steven Makwega, learned State Attorney.

Mr. Mutalemwa filed a memorandum of appeal with twelve grounds of complaint. Some of the grounds are in the alternative to the others. In view of the position we have taken on the appeal we will not do two things. **One**, we will not address all the grounds. Instead, we will discuss only two grounds. **Two**, we will not state the facts of the case that led to the conviction and the sentence.

The 12th ground of appeal reads as follows:-

> *12. That the trial court erred in law in convicting without affording a fair trial/hearing to the appellant on account that the court did not sit with assessors at the commencement of the trial.*

In elaboration on the above ground, Mr. Mutalemwa was of the view that under **Section 265** of the **Criminal Procedure Act** (CAP 20 R.E. 2002), hereinafter the **Act**, all trials before the High Court are conducted with the aid of assessors. So, since a preliminary hearing is a trial, the preliminary hearing in this case ought to have been conducted with the aid of assessors, he stressed. He referred us to the preliminary hearing on pages 3-6 of the record in which it is clear

that the trial judge (Mchome, J.) did not sit with assessors. In this regard, he went on to say, since trials before the High Court are with the aid of assessors in conducting the preliminary hearing under **Section 192** of the **Act**, the trial judge ought to have sat with assessors. However, Mr. Mutalemwa did not cite any authority in support of the above proposition.

In his brief response, Mr. Makwega was of the view that a preliminary hearing is part of the trial which commences before the main trial. There is nothing under **Section 192** that provides for assessors in a preliminary hearing. The essence of **Section 192** is merely to speed up trials. So, even if a preliminary hearing is not conducted that does not vitiate the proceedings in the main trial, he asserted.

The above point need not detain us. It is common ground that there is nothing under **Section 192** to the effect that a preliminary hearing before the High Court should be with the aid of assessors. In fact, even under the **Accelerated Trial and Disposal of Cases Rules** (GN 192 of 1988) made under s**ub-section 6** thereto there is

nothing to that effect. The **Act** came into effect on 1st November 1985 by virtue of **GN No. 375 of 1985**. Prior to the enactment of the **Act** there was no provision for a preliminary hearing in our laws. This is borne out by the fact that prior to its enactment in 1985 the repealed **Criminal Procedure Code** (CAP 20 Volume 1 of the Laws) did not have such a provision. Following the enactment of the **Act, Section 192** was introduced thereto. It is also significant to mention here that **Section 265** of the **Act** is in *pari materia* with **Section 248** of the repealed **Code** that all trials before the High Court should be with the aid of assessors. So, at the time of enacting the **Act** if the legislature had intended that a preliminary hearing should be with the aid of assessors it could have easily enacted so. Since it did not do so, there is no basis for saying that a preliminary hearing before the High Court should be with the aid of assessors. Perhaps, the legislature, in its wisdom, did not do so for one main reason. The idea behind **Section 192** is to accelerate trials and minimize costs. Introducing assessors in a preliminary hearing might necessitate extra costs. In fact, we wish to observe here in passing that inspite of the provisions of **Section 265** of the **Act** requiring that **all** trials before the High Court

be conducted with the aid of assessors, in practice that is not always the case. Not in **all** trials is the aid of assessors necessary. For instance, a trial within a trial is conducted without the aid of assessors. Therefore, there is nothing unusual in conducting a preliminary hearing without the aid of assessors.

The complaint in the 11th ground of appeal has a bearing on the proceedings of the High Court dated 14/11/2005 thus:-

"***Mr. Ndjike:*** *My Lord, we close our case.*

Mr. Kabunga: *My Lord, I don't want to submit.*

RULING

The accused has a case to answer.

B. M. Luanda
JUDGE
14/11/2005

Mr. Kabunga: *My Lord, we pray for a short adjournment for defence. One hour could do.*

B. M. Luanda
JUDGE
14/11/2005

CT: *Granted.*

Order: *Defence 12.00 noon.*

B. M. Luanda
JUDGE
14/11/2005"

It is evident from the above record of proceedings that the appellant was not informed of his right under **Section 293 (2)** of the **Act**. The **sub-section** reads:-

> *"(2) 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 supplied.)

Mr. Mutalemwa and Mr. Makwega are at one that the above **sub-section** is couched in imperative terms and that the trial judge ought to have informed the appellant of his right provided for under the **sub-section**. With respect, we agree with them.

As submitted by both learned counsel, the above **sub-section** is couched in mandatory terms. That is by virtue of the use of the word **"shall"** in the **sub-section**. This means that it was mandatory to perform the function stated in the **sub-section**. In this spirit, **Section 53 (2)** of the **Interpretation of Laws Act** (CAP 1 R.E. 2002) is relevant. **Sub-section (2)** thereto reads:-

> *(2) Where in a written law the word **"shall"** is used in conferring a function, such word **shall** be interpreted to mean that the function so conferred **must** be performed.*
> (Emphasis supplied.)

We may add here that the **Interpretation of Laws Act** came into effect on 1/9/2004 vide **GN 312 of 2004** which was published on 1/9/2004. So, at the time of the trial of this case this Act was in

operation. Therefore, the High Court ought to have informed the appellant of his right under the **sub-section**. The failure to do so led to one major effect, that is, there was no fair trial.

At this juncture, we think it is pertinent to mention one other point in passing. In the course of arguing the 11th ground Mr. Mutalemwa persistently referred us to Articles of our Constitution relating to the right of a fair hearing. With respect, it was not necessary to do so. In saying so, we wish to subscribe to, and associate ourselves with approval, with the view expressed by Lugakingira, J. (as he then was) in **Shabani Msengesi v National Milling Corporation**, High Court (MZA), Civil Appeal No. 44/94 (unreported), citing the Zimbabwe case of **Ministry of Home Affairs v Rickle and Others**, (1985) LRC (Const) 755, that:-

> *It is a cardinal principle of constitutional law that where an issue can be resolved without recourse to the constitution, the constitution should not be involved.*

As we demonstrated above, the point at stake here could safely be decided without necessarily invoking the Constitution.

the circumstances? On this, Mr. Mutalemwa was, with the greatest respect, not consistent. At one stage he said that we should nullify the proceedings subsequent to those of 14/11/2005 and order the High Court to proceed therefrom. At some later stage he appeared to be saying that we should not do so because if we do so, the prosecution might fill in gaps in their case during the cross-examination of the appellant. Again, with respect, we fail to see the rationale or logic behind the latter suggestion.

In our considered opinion, we will go along with the suggestion put forward by Mr. Makwega that the safest thing to do in the circumstances will be to nullify the proceedings that followed the **closure** of the prosecution case. Accordingly, in exercise of our revisional jurisdiction under **Section 4 (2)** of the **Appellate Jurisdiction Act, 1979**, as amended by **Act No. 17 of 1993**, we hereby quash and set aside the proceedings which followed the closure of the prosecution case on 14/11/2005. The High Court is directed to reconstitute itself and proceed from where it ended on

14/11/2005 when Mr. Ndjike informed the Court that the prosecution side was closing its case.

DATED at MWANZA this 6th 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.

(J. S. MGETTA)
DEPUTY REGISTRAR