IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

(CORAM: LUANDA, J.A., MASSATI, J.A. And MUGASHA, J.A.)

CRIMINAL APPEAL NO. 162 OF 2015

MAPUJI MTOGWASHINGE.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Tabora)

(Rumanyika, J.)

dated the 6th day of November, 2014
in
Criminal Session Case No. 164 of 2011

JUDGMENT OF THE COURT

27th November & 2nd December, 2015

LUANDA, J.A.:

MAPUJI MTOGWASHINGE (henceforth the appellant) was charged, convicted of murder by the High Court of Tanzania (Tabora Registry) and was sentenced to suffer death by hanging. Aggrieved by the finding of the High Court, he has preferred this appeal in this Court.

The evidence which form the basis of conviction was the extra judicial statement of the appellant which is said to have been given voluntarily before

Peter Reuben (PW2) a Primary Court Magistrate Court cum Justice of Peace stationed at Bukombe District Court. Indeed that statement was tendered in Court during trial without any objection having been raised by the defence side. What is contained in the statement is that the appellant told PW2 that he hired his brother in law to kill his own mother one Kundi d/o Sahani by cutting her with a panga while he stood at a door of their house with a view to preventing her from running. The reason for the killing is that he believed his mother was a witch.

The trial learned Judge was satisfied that the appellant confessed to have killed his mother voluntarily. So, the prosecution had proved its case. But all the three assessors who sat with the learned trial Judge differed and were of the view that the prosecution failed to prove its case.

Be that as it may, the appellant in this appeal had the services of Mr. Mugaya Mtaki learned advocate; whereas the Republic/respondent was represented by Ms. Upendo Malulu learned State Attorney. Mr. Mtaki has filed a memorandum of appeal consisting of three grounds and dropped the one earlier filed by the appellant. The grounds of appeal raised by Mr. Mtaki are:

(1) *That the learned trial Judge erred in law in allowing the assessors to cross-examine the witnesses in violation of the principles of fair trial.*

(2) *That the learned trial Judge erred in law in failing to address the Appellant in terms of S.293 (2) (a) (b) of the Criminal Procedure Act, Cap. 20 R.E. 2002.*

(3) *That the learned trial Judge erred in law in holding that the prosecution had proved the guilt of the Appellant beyond reasonable doubts.*

Arguing the first ground, Mr. Mtaki was focused and to the point. He said the 1st, 3rd assessors and even the trial Judge as shown on pages 22 and 25 of the record cross-examined the witnesses instead of seeking clarification. That he said was not proper. He referred us to our case **KULWA MAKOMELO & TWO OTHERS v R**, Criminal Appeal No. 15 of 2014 (CAT. Unreported) where the Court said it is not permissible for the assessors to cross-examine the witnesses. He accordingly prayed that the entire proceedings be nullified and we order a retrial.

As regards to the 2nd ground, after a short dialogue with the Court, Mr. Mtaki dropped this ground. This is because though it is not reflected in the record to the effect that S. 293 (2) (a) and (b) of the Criminal Procedure Act, Cap. 20 R.E. 2002 (the CPA) which requires the trial High Court to address the appellant of his right to give evidence and call witnesses, the section was complied with as after the Court had made a finding that a *prima facie* case had been established and the learned Counsel on behalf of the appellant informed the Court how the appellant will adduce his evidence. The appellant had neither witnesses to call nor exhibits to tender. Notwithstanding the fact that the Judge did not indicate in the record S. 293 (2) (a) and (b) of the CPA to have been complied with, for all intents and purposes the section was complied with. Mr. Mtaki also dropped ground three. In any case that ground in the first place ought to have been raised in the alternative to the first ground. The reason is simple to find in that if the first ground holds then this ground has no leg to stand on.

When prompted by the Court that the extra Judicial statement lacked an important element in that no caution was addressed to the appellant that in case he gives the statement the same might be tendered in Court as evidence against himself. Mr. Mtaki said it was not properly taken.

On the other hand Ms. Malulu supported the appeal. She joined hands with Mr. Mtaki and clarified that actually it is the kind or contents of questions put across by assessors which show that they cross-examined. Further, she pointed out another anomaly that the learned trial Judge did not give reasons as to why he differed with the assessors. Indeed the record indicates so. We wish to remind trial judges that assessors assist the Court to arrive at a just decision. In case the judge differs with them, he should, according to a well-established practice popularly known as **BALAND SINGH RULE** give reasons for doing so notwithstanding the fact that their opinions are not binding to the trial judge. (See **BALAND SINGH v R 1954 21 EACA 209: CHARLES SEGESELA v R**, Criminal Appeal No. 13 of 1973; Court of Appeal for East Africa, **USI ATHUMANI MAU v R** [1988] TLR 78 and **YOHANIS MSIGWA v R**, [1990] TLR 148). To brush aside their opinions without assigning any reason is a sign of disrespect. As to the extra judicial statement to have not contained the caution element, Ms. Malulu said the same was not properly taken. She did not elaborate.

We have read the record very carefully. At page 22 the 3rd assessor is reported to have "questioned" PW3 D/Cpl. Erick the following:-

Xd – 3rd Assessor: *I just wanted to clear all doubts. That is why I kept on looking for some new information. The wound was minor. Perhaps Justice of the peace never saw it. Nor did the accused disclose it to him.*

Whereas the learned trial Judge on the same page same witness "questioned" the following:-

Xd - Court: *I just do not know if he got supper in the night of his arrest. He had the lunch on 24/05/2010 Misc. Amendment Act No. 3/2012 even a D/C could record a cautioned statement.*

On page 25 of the record, the 1st assessor "asked" the appellant after he had finished giving evidence:-

Xd - 1st Assessor: *I never knew my mother was a witch before.*

Having carefully read the above extracts, between the lines, it is clear that the 1st, 3rd assessors and the Judge asked questions to PW3 and the appellant not geared toward clarification, which is their domain, rather they actually intended to test their veracity. Definitely they had gone beyond

their territory. In actual fact they had raised new matters altogether *vis-a-vis* the evidence given by PW3 and the appellant. That falls under S.146, S. 147 and S. 155 of the Evidence Act, Cap. 6 R.E. 2002 (the Act) which shows what is examination in chief and who can cross-examine. Assessors are not covered in those Sections. For ease of reference we reproduce the Sections:

> *146. (1). The examination of witness by the party who calls him shall be called his examination-in-chief.*
>
> *(2). The examination of a witness by the adverse party shall be called his cross-examination.*
>
> *(3). The examination of a witness, subsequent to the cross-examination, by the party who called him, shall be called his re-examination.*
>
> *147. (1). Witnesses shall be first examined –in-chief, then (if the adverse party so desires) cross-examined, then (if the party calling them so desires) re-examined.*
>
> *(2). The examination-in-chief must relate to relevant facts, but the cross-examination need*

not be confined to the facts to which the witness testified on his examination-in-chief.

(3). The re-examination shall be directed to the explanation of matters referred to in cross-examination; and, if new matter is, by permission of the court, introduced in re-examination, the adverse party may further cross-examine upon that matter.

(4) The court may in all cases permit a witness to be recalled either for further examination-in-chief or for further cross-examination, and if it does so, the parties have the right of further cross-examination and re-examination respectively.

(5) Notwithstanding the preceding provisions of this section, the court may, in any case, defer or permit to be deferred any examination or cross-examination of any witness until any other witness or witnesses have been examined-in-chief or further cross-examined, re-examined or, as the case may be, further examined-in-chief or further cross-examined.

155. When a witness is cross-examined, he may, in addition to the questions hereinbefore referred to, be asked any questions which tend-

(a) to test his veracity;

(b) to discover who he is and what is his position in life; or

(c) to shake his credit, by injuring his character, although the answer to such questions might tend directly or indirectly to incriminate him, or might expose or tend directly or indirectly to expose him to a penalty or forfeiture.

The role of assessors in putting questions is covered under S.177 of the Act. It provides:

177. In cases tried with assessors, the assessors may put any questions to the witness, through or by leave of the judge, which the judge himself might put and which he considers proper."

So, from above, assessors and Judges are not allowed to cross-examine witnesses as that is the function of an adverse party to a proceedings. It is clear then that the duty of assessors and the Judge is to put questions to witnesses for clarification and not to cross-examine as the aim of cross-examination is basically to contradict, weaken or cast doubt upon the accuracy of the evidence given by the witness in chief. (See **KULWA**

MAKOMELO case cited, **MATHAYO MWALIMU AND ANOTHER V R**, Criminal Appeal No. 174 of 2008 and **GODLOVE AZAEL @ MBISE V R**, Criminal Appeal No. 312 of 2007 (All unreported). In order to play safe, we wish to emphasis that when Judges sit with assessors they should have a firm control over the type of questions the assessors may wish to put across least they overstretch their territory. (See also **ABDALLAH BAZAMIYE AND OTHERS V R**, [1990] TLR 42).

In a number of cases where it is shown the assessors (now even the Judges) to have cross-examined witnesses is taken the accused to have not been accorded a fair trial in particular it offends the rule against bias which goes contrary to Article 13(6) (a) of the Constitution which is a fundamental right of an individual. That irregularity is incurably defective. (See **KULWA MAKOMELO** case, **KABULA LUHENDE V R**, Criminal Appeal No. 281 of 2014; **MAWEDA MASHAURI MAJENGA @ SIMON V R**, Criminal Appeal No. 29 of 2004 (CAT- all unreported).

Since the irregularity is incurably defective, in the exercise of our revisional powers as provided under S.4(3) of the Appellate Jurisdiction Act,

Cap. 141 R.E. 2002, we declare the High Court proceedings a nullity. We quash the conviction and set aside the sentence.

Ordinarily we would have ordered a retrial because the trial was defective and a human being was lost. But the sole evidence which the prosecution relied upon is wanting. We have said that the extra judicial statement lacked one of the most important element in such a document, namely a caution. In order to appreciate what we are trying to drive home, we reproduce the first part of the statement:

EXTRA JUDICIAL STATEMENT

KATIKA MAHAKAMA YA MWANZO

MAHALA – RUNZEWE

MBELE YA PETER REUBEN

1. *MAHABUSU MAPUJI s/o MTOGWASHINGE ameletwa mbele yangu akiwa katika ulinzi wa askari wa usalama F. 1568 D/C ERICK wakati was saa 7.30 mchana tarehe 24/5/2010.*
2. *Nimejulishwa na polisi F.1568 D/C ERICK kwamba mshtakiwa ameshtakiwa kwa kosa la MAUAJI.*
3. *Mahabusu amewekwa katika ulinzi wa mlinzi wa AMANI na askari wa usalama F.1568 D/C ERICK*

ameamriwa kuondoka katika chumba ambamo ushahidi wa mahabusu umenakiliwa.

4. *Mkalimani HAYUPO.*
5. *Mahabusu amearifiwa kwamba yuko mbele ya MLINZI WA AMANI na ameulizwa kama yuko tayari kujibu lolote naye amejibu kuwa yuko tayari.*
6. *Kwa ridhaa yake mahabusu nimekunjua nimeona hana michubuko iliyosababishwa wakati wa kukamatwa.*
7. *Mahabusu ameeleza alikamatwa Jumapili 23-5-2010 saa za asubuhi saa 2.00 asubuhi na watu wa MWANO. Na nimepelekwa hadi NAMALANDULA na hapo nilifuatwa na ASKARI wa MSASA kwenye saa 12.00 jioni na nilienda kukaa kituo cha POLISI MSASA.*
8. *MAHABUSU ameelezwa kwamba yupo kueleza maelezo yake kama anavyotaka.*

RPT. OF

MAPUJI MTOGWASHINGE

The appellant then gave the statement.

Under S. 56 (2) of the then Magistrates' Court Act, 1963 Cap. 537 which is *pari materia* with section 62 (2) of the current Magistrates' Courts

Act, Cap. 11 R.E. 2002 the Chief Justice is empowered to issue instructions to the Justices of the Peace for the better undertaking of their duties. The section reads: -

> *"52 (2) The appropriate judicial authority may, from time to time, issue instructions not inconsistent with any law for the time being in force for the guidance and control of justices of the peace in the exercise of their powers, functions, and duties, and every justice of the peace* ***shall*** *comply with and obey such instructions".* [Emphasis supplied.]

On the authority of the above cited section, the Chief Justice who is the appropriate judicial authority under s.2 of the above cited law, issued instructions to the Justices of the Peace to guide them. The same were published in a booklet titled "A Guide for Justice of the Peace" which contain, inter alia, the manner of taking extra Judicial statements from 1st July, 1964 the date when the Magistrates Court Act, Cap. 537 came into force.

But in 1984, the Magistrates' Court Act, Cap 537 was repealed and replaced by the Magistrates' Courts Act, 1984 (Act No. 2 of 1984) which now is Cap 11 of the Revised Edition, 2002. Notwithstanding the repeal and replacement of Cap. 537 with Cap 11, by virtue of the saving provisions as

contained in section 72 (3) of the Magistrates' Courts Act, Cap 11, the aforesaid Chief Justice's Instructions are part and parcel of the laws of this Land until and unless they are revoked or amended. To our recollection the same have either been revoked nor amended. The section provides: -

> *"72 (3) Any applicable regulation made under the Magistrates' Court act, 1963, and in force prior to the date upon which this Act comes into operation shall remain in force as if they have been made under this Act until such time as they are amended or revoked by rules made under this Act."*

So, when Justices of the Peace are recording confessions of persons in the custody of the police, they must follow the Chief Justice's Instructions to the letter. The section is couched in mandatory terms. Before the Justice of the Peace records the confession of such person, he must make sure that all eight steps enumerated therein are observed.

The Justice of the Peace ought to observe, inter alia, the following:

(i) The time and date of his arrest
(ii) The place he was arrested
(iii) The place he slept before the date he was brought to him

(iv) Whether any person by threat or promise or violence he has persuaded him to give the statement.

(v) Whether he really wishes to make the statement on his own free will.

(vi) That if he make a statement, the same may be used as evidence against him.

In **JAPHET THADEI MSIGWA V R**, Criminal Appeal No. 367 of 2008 (CAT-Unreported) the Court explained the need to observe the Chief Justice's Instructions. The Court said: -

> *"We think the need to observe the Chief Justice's Instructions are two fold. One, if the suspect decided to give such statement he should be aware of the implications involved. Two, it will enable the trial Court to know the surrounding circumstances under which the statement was taken and decide whether or not it was given voluntarily. Non compliance will normally render the statement not to have been taken voluntarily."*

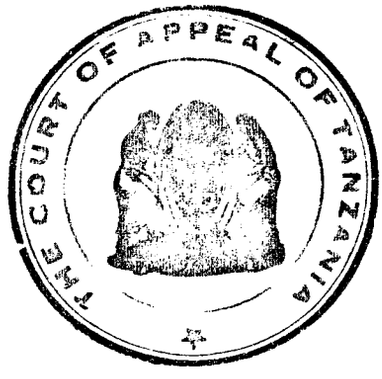
In our case the appellant was not cautioned that in case he gives the statement the same might be used as evidence against him. The Justice of Peace (PW2) did not comply with the above instruction. It is highly doubtful whether the appellant was aware that what he had said could be used as

evidence against him during trial. Since he was not cautioned, definitely the Chief Justice's Instructions were not followed. The appellant cannot be said to have given the statement voluntarily. That evidence is inadmissible. Since that is the only evidence the prosecution relied upon, to make an order of retrial of the appellant relying on such very weak evidence is a wastage of resources and time.

In sum we make an order that the appellant be released from prison forthwith unless detained in connection with another matter.

Order accordingly.

DATED at **TABORA** this 30th day of November, 2015.



B. M. LUANDA
JUSTICE OF APPEAL

S. A. MASSATI
JUSTICE OF APPEAL

S. E. MUGASHA
JUSTICE OF APPEAL

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

P. W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL