IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

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

CRIMINAL APPEAL NO. 166 OF 2015

NATHAN BAGUMA @ RUSHEJELA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Mwambegele, J.)

dated the 5th day of November, 2014
in
Criminal Session Case No. 96 of 2011

JUDGMENT OF THE COURT

26th November & 8th December, 2015

LUANDA, J.A.:

NATHAN s/o BAGUMA @ RUSHEJELA was charged in the High Court of Tanzania (Tabora Registry) sitting at Kigoma with three counts of attempted murder. He was convicted as charged and sentenced to 30 years imprisonment on each count. The sentences were ordered to run concurrently.

Dissatisfied with the finding and sentences of the High Court, he has preferred this appeal in this Court.

In this appeal, Mr. Kamaliza Kayaga, learned counsel represented the appellant; whereas the Republic/respondent had the services of Mr. Juma Masanja, learned Senior State Attorney. Mr. Kayaga raised two grounds in the memorandum of appeal. One, the defence of the appellant was lightly discounted and not adequately considered. Two, the sentence of 30 years imprisonment on each count imposed was manifestly excessive.

Mr. Kayaga argued with force the two grounds he had raised on behalf of his client. Mr. Masanja resisted the appeal saying the trial High Court adequately considered the defence. As to sentence he said it is not excessive at all. We do not, however, propose to consider the grounds raised and submissions made thereof for the reason we shall shortly give.

In the course of hearing the appeal, the Court drew the attention to the learned counsel as to whether the course taken by the trial High Court Judge in allowing the assessors to cross-examine the witnesses on both sides of the case was proper. Both were at one that it was not proper and that the irregularity vitiates the entire proceedings as that goes against one of the principles of natural justice namely the Rule against bias. However, the two differ as to the way forward. Mr. Masanja prayed that

we order a retrial. On the other hand Mr. Kayaga prayed that we order the release of the appellant as he is in prison for five years.

The record of appeal shows that after each prosecution witness had finished testifying, the counsel for the appellant cross-examined that witness. On completion, the assessors took the floor. When they had finished, the counsel for the prosecution re-examined his witness. That procedure was also followed on the defence case. Reading sections 146, 147, 155 and 177 of the Evidence Act Cap. 6 RE. 2002 (the Act) together, the procedure adopted by the learned trial judge was wrong. One, the place where assessors were given opportunity to put questions was not the right place. Second, even the type of questions asked were not geared towards clarification. The assessors cross-examined the witnesses. Assessors are not allowed to cross-examine witnesses as that is the function of an adverse party to a proceedings. (See **KULWA MAKOMELO AND TWO OTHERS V R**, Criminal Appeal No. 15 of 2014 (CAT – unreported); **MAPUJI MTOGWASHINGE V R**, Criminal Appeal No. 162 of 2015 (CAT – unreported); **ABDALLAH BAZAMIYE AND OTHERS V R**, [1990] TLR 42).

And by reading S.147 of the Act properly, the correct place as to the time the assessors and even the Judge to put questions is after re-examination and not before. The section provides: -

> *"147. (1) Witness 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, er-examined or, as the case may be, further examined-in- chief or further cross-examined."

Once it is shown that the assessors who assist the trial judge in the High Court have cross-examined witnesses, the accused person is taken to have not been accorded a fair trial because the assessors are taken to have been biased. (See **KABULA LUHENDE V R**, Criminal Appeal No. 281 of 2014 and **KULWA MAKOMELO** case cited above). That goes contrary to Article 13(6) (a) of the Constitution of The United Republic of Tanzania. The irregularity is incurably defective. So, we quash the proceedings.

We are aware that generally a retrial will be ordered only when the original trial was illegal or defective. But even then that is not the rule of the thumb; it will depend on particular facts and circumstance of each case. The test is whether it is in the interests of justice to do so and whether it is likely to cause injustice to the accused. (**FATEHALI MANJI V R.** [1966] EA 3440). The appellant has been in prison for 5 years now.

He was sentenced to 30 years imprisonment on each count. The sentences were ordered to run concurrently. It means the appellant so far has not served a substantial portion of his sentence. Taking this into consideration and direction we will make hereunder, we are of the settled view that to order retrial will not cause injustice. In the interest of justice, we order the trial to commence afresh before another Judge and a new set of assessors. In case the outcome of the trial will be the same, we direct the trial court, when sentencing, to take into account the period he had already served.

Order accordingly.

DATED at **TABORA** this 7th day of December, 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