IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

CRIMINAL APPEAL NO. 208 OF 2014

(CORAM: RUTAKANGWA, J.A., MJASIRI, J.A., And KAIJAGE, J.A.)

TITO MANG'OMBE ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT
(Appeal from the Decision/Judgment of the High Court of Tanzania at Mwanza)

(De-Mello, J.)

dated the 31st day of March, 2014

in

Criminal Sessions Case No. 102 of 2009

JUDGMENT OF THE COURT

30th November & 8th December, 2015

MJASIRI, J.A.:

In the High Court of Tanzania sitting at Mwanza, the appellant was charged and convicted of the offence of murder contrary to section 196 of the Penal Code, Cap. 16, R.E. 2002 and was sentenced to death. Aggrieved by the conviction and sentence he has appealed to this Court.

It was alleged by the prosecution that the appellant on or about July 16, 2007 at Ng'haya Village within Magu District in Mwanza Region

murdered one Mitumba Makelemo. The appellant denied the charge. Only one witness was called by the prosecution during the trial.

At the hearing of the appeal the appellant was represented by Mr. Constantine Mutalemwa, learned advocate, while the respondent Republic was represented by Ms. Revina Tibilengwa, learned Senior State Attorney.

Mr. Mutalemwa presented a five (5) point supplementary memorandum of appeal in addition to the memorandum of appeal lodged in Court earlier by the appellant. The grounds of appeal are reproduced as under:

> *"1. That the trial court erred in law for failure to record the evidence in the acceptable manner.*
> *2. That the trial court was not impartial in conducting the trial on account that the assessors were allowed to cross-examine the witnesses of both the prosecution and defence sides.*
> *3. Alternatively, the trial court erred in law for failure to sum up the case to assessors by explaining the essential elements of the murder case which faced the appellant.*

4. That the trial court erred in law by not conducting the trial for failure to address itself on the point whether the appellant had a case to answer.

5. That the trial court erred in law for failure to discharge its duty of explaining the statutory basic rights available to the appellant after the close of the prosecution case."

During the hearing of the appeal, Mr. Mutalemwa sought leave of the Court to abandon grounds No. 3, 4 and 5 and to address the Court on grounds one and two only.

In relation to ground No. 1, he contended that no evidence was presented by the prosecution. Only one witness testified in the High Court, however, this witness was not sworn in by the Court. Though the witness had indicated that she does not profess any faith, neither Christianity nor Islam, the witness should have been affirmed. This is a requirement under the law and failure to do so renders the proceedings a nullity. Consequently the evidence should be expunged from the record. He made reference to section 198 of the Criminal Procedure Act, Cap. 20 R.E. 2002 (the Criminal Procedure Act). As the prosecution case relied on the

evidence of a single witness, once PW1's evidence is expunged from the record, there remains no other evidence. He asked the Court to quash the conviction of the appellant and to set aside the death sentence. He asked the Court to release the appellant forthwith.

Mr. Mutalemwa also complained on the way the evidence was recorded by the trial Judge. According to him, the manner in which the evidence was recorded was unacceptable. He submitted that the acceptable practice is to record the evidence in a form of a narrative. He made reference to section 215 of the Criminal Procedure Act. He stated that even though section 215 imposes no specific requirement to record evidence in a form of a narrative, section 210 of the Criminal Procedure Act which relates to subordinate courts clearly provides the manner of recording evidence. The trial Judge should have borrowed a leaf from section 210. Mr. Mutalemwa also made reference to section 359 of the Indian Code of Criminal Procedure which specifically direct that that the evidence should ordinarily be taken down in a form of a narrative. He stated that the procedure adopted by the trial judge was highly irregular.

On ground No. 2, Mr. Mutalemwa vehemently argued that the right to cross examine a witness is vested on the adverse party and not on the assessors. Section 177 of the Evidence Act Cap. 6 R.E. 2002 (the Evidence Act) gives directions of when assessors can ask questions. The appellant did not therefore have a fair trial. He made reference to the cases of **Kulwa Makomelo and Two Others v. Republic,** Criminal Appeal No. 15 of 2014 and **Mussa Rashid v. Republic,** Criminal Appeal No. 348 of 2009 CAT (both unreported).

Ms. Tibilengwa on her part, did not support the conviction. She conceded that PW1 was not sworn in as required under section 198 of the Criminal Procedure Act. She submitted that in view of the irregularity, that the evidence of PW1 should be expunged. Once PW1's evidence is expunged, there remains no other evidence to sustain the conviction. She cited **Mussa Rashid v. Republic** (supra) at page 10-11 and asked the Court to order a retrial.

On the manner the evidence was recorded, she was in full agreement with the learned advocate for the appellant that the evidence was not recorded in a conventional manner and was contrary to the requirements

under the law. Even though section 215 of the Criminal Procedure Act provides no specific directions, the trial court should have borrowed a leaf from section 210 of the Criminal Procedure Act which provides for direction as to how evidence should be recorded.

With regard to grounds No. 2, the learned State Attorney conceded that the assessors had no right to cross examine and by doing so there was no fair trial and the trial was a nullity. She submitted that section 177 of the Evidence Act was not complied with.

We on our part, after a very careful perusal of the record and taking into consideration the submissions by counsel are inclined to agree with counsel. On looking at ground No. 1. It is evident from the record that PW1 was not sworn in as required under the law.

Section 198 (1) of the Criminal Procedure Act provides as follows:-

> *"Every witness in a criminal cause or matter shall, subject to the provisions of any other written law to the contrary, be examined upon oath or affirmation in accordance with the provisions of the Oaths and Statutory Declarations Act."*

Section 4 of the Oaths and Statutory Declarations Act, Cap. 34, R.E. 2002 and the Rules thereunder requires that in all judicial proceedings, courts should administer oaths to witnesses professing Christianity and affirmations to those who are not Christians. The law is settled. If the evidence of any witness is taken without oath or affirmation, such evidence is no evidence at all and is to be discarded. See **Godi Kasenegela v. Republic,** Criminal Appeal No. 10 of 2008, **Minja Sigore @ Ogora v. Republic,** Criminal Appeal No. 54 of 2008, **Membi Steyani v. Republic,** Criminal Appeal No. 300 of 2008 and **Athumani Bakari v. R.,** Criminal Appeal No. 284 of 2008 CAT (all unreported). Therefore there must be evidence on record to establish that either the oath or affirmation has been administered and taken by a witness.

In the present case, PW1 who did not profess any faith did not take any affirmation. In view of the established legal position her evidence is not of any value and should be expunged from the record.

Mr. Mutalemwa urged the Court to acquit the appellant. However, Ms. Tibilengwa asked the Court to order a retrial. In the case of **Fatehali**

Manji v. Republic (1966) EA 343 the factors to be considered in deciding whether or not to order a retrial were stated thus:-

> *"In general, a retrial may be ordered only when the original trial was illegal or defective, it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purposes of enabling the prosecution to fill in the gaps in its evidence at the first trial . . . Each case must depend on its own facts and an order for retrial should only be made where the interest of justice requires it."*

In **Mussa Rashid v. Republic,** (supra) the Court in determining whether or not to order a retrial considered the interests of both sides of the scale of justice. The Court took into account fairness of the proceedings which involves a consideration not only of fairness to the accused person but also fairness to the public. The Court fully subscribed to the sentiments in **R. v. Sang** (1979) 1 ALL ER. 1222 and **R. v. Smirthinaite** (1994) 1 ALL E.R. 898.

The Court in **Mussa Rashid** also made reference to **Marko Patrick Nzumila & Another v. Republic,** Criminal Appeal No. 141 of 2010 CAT (unreported) where it was held as under:

> *"Failure of justice (sometimes, referred to as miscarriage of justice) has . . . equally occurred where the prosecution is denied an opportunity of conviction. This is because, while it is always safer to err in acquitting than punishment, it is also in the interests of the state that crimes do not go unpunished. So, in deciding whether a failure of justice has been occasioned, the interests of both sides of the scale of justice have to be considered."*

Given the nature and seriousness of the offence the appellant is charged with, we are of the considered view that the scales of justice heavily tips on a retrial, a retrial is therefore inevitable.

In relation to Mr. Mutalemwa's complaint that the evidence has not been recorded in an acceptable manner, we would like to make the following observations. The procedure for recording evidence in a criminal trial is clearly set out in section 215 of the Criminal Procedure Act for proceedings in the High Court and section 210 of the Criminal Procedure Act for trials in the subordinate courts. While section 210 is very elaborate on the procedure to be followed, for trials in the High Court the procedure is laid down in the Criminal Procedure (Record of Evidence) High Court

Rules GNs Nos 28 of 1953 and 286 of 1956 (the Rules). Rule 3(a) provides as under:-

> *"a record or memorandum of the substance of the evidence taken down in writing by the Judge,* ***which shall not ordinarily be in the form of question and answer but in the form of a narrative."***
> *[Emphasis provided].*

It is apparent from the record that evidence has been recorded in précis contrary to the requirements under the Rules. The objective of recording the evidence in narrative form is to give a clear, concise and cogent account of the testimony given in Court.

This methodology is also a requirement in India. Section 359 of the Indian Criminal Procedure Code, Volume V of 1898 provides as follows:-

> *"Evidence taken under section 355 or section 357 shall not ordinarily be taken down in the form of question and answer but in the form of a narrative."*

On a careful examination of the record, Rule 3 (a) has not been complied with.

Ground No. 1 alone was sufficient to finalise this appeal. However, we are of the considered view that Mr. Mutalemwa's second ground of appeal needs to be addressed in view of other serious procedural irregularities in the proceedings. The major complaint is that instead of putting up questions to the prosecution witnesses and the appellant, the assessors cross-examined them. This is contrary to the principles of fair trial entrenched under Article 13 (6) (a) of the Constitution of the United Republic of Tanzania. This anomaly constituted a breach of one of the fundamental principles of natural justice, that is the right to be heard by a fair/unbiased tribunal. The assessors are only expected to put questions to the witnesses. Section 177 of the Evidence Act provides as under:-

> *"In cases tried with assessors, the assessors may put any questions to the witness, through or by leave of the court, which court itself might put and which it considers proper."*

Section 290 of the Criminal Procedure Act provides as under:

> *"The witnesses called for the prosecution shall be subject to cross-examination by the accused person or his advocate and to re-examination by the advocate for the prosecution."*

Section 146 (2) of the Evidence Act provides that the examination of a witness by the adverse party is cross examination. From the wording of section 146 (2) cross examination of a witness is the exclusive right of an adverse party.

According to section 155 of the Evidence Act, cross examination would constitute the following:-

> *"When a witness is cross examined he may in addition to the question herein before referred to, be asked only questions which tend to*
>
> *a) 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 to directly or indirectly to incriminate him, or might expose or tend directly or indirectly to expose him to a penalty or forfeiture."*

The assessor is not expected to conduct himself in terms of section 155. The law is settled that assessors are not supposed to cross examine. See for instance **Mathayo Mwalimu, & Another v. Republic,** Criminal

Appeal No. 174 of 2008; **Augustine Ludara v. Republic,** Criminal Appeal No. 70 of 2010 and **Yusuph Sylvester v. Republic** Criminal Appeal No. 126 of 2014 CAT (all unreported).

In **Mathayo Mwalimu** (supra) the Court stated thus:

> *". . . the function of cross examination is the exclusive domain of an adverse party to a proceeding."*

The Court proceeded further to explain the purpose of cross examination. It was stated as follows:-

> *"the purpose of cross examination is essentially to contradict. By the nature of the function, assessors in a criminal trial are not there to contradict. Assessors should not therefore assume the function of contradicting a witness in the case. They are there to aid the court in fair dispensation of justice."*

In **Abdallah Bazamiye and Others v. Republic** 1990 TLR 47 the Court pointed out that,

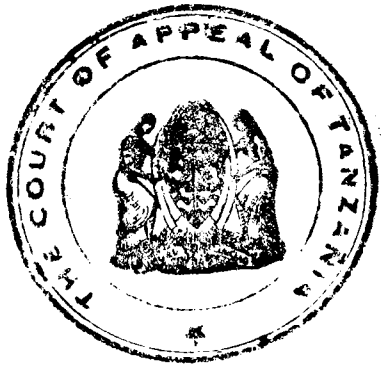
> *"It is not the duty of assessors to cross-examine or re-examine witnesses or the accused. The assessor's duty is to aid the judge in accordance with section 265 and to do this they may put their*

questions as provided under section 177 of the Evidence Act. The assessors being part of the court are supposed to be impartial. This renders the whole proceedings a nullity."

See for instance **Kulwa Makomelo, & Two Others v. Republic,** Criminal Appeal No. 15 of 2014, CAT (unreported).

This procedural irregularity has the effect of nullifying the entire proceedings. In the result, in view of our findings hereinabove we accordingly allow the appeal and order a retrial before another Judge.

DATED at MWANZA this 7th day of December, 2015.



E. M. K. RUTAKANGWA
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

S. S. KAIJAGE
JUSTICE OF APPEAL

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

E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL