IN THE COURT OF APPEAL OF TANZANIA
AT TABORA

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

CRIMINAL APPEAL NO 164 OF 2015

AMOS WILSON @ SANKARA NTIBONEKA .....APPELLANT
VERSUS
THE REPUBLIC.....RESPONDENT
(Appeal from the Judgment of the High Court of Tanzania at Tabora)

(Mwambegele, J)

Dated the 27th day of October, 2014
In
Criminal Session Case No. 141 of 2010
.....
JUDGMENT OF THE COURT

2nd & 7th December, 2015
LUANDA, J.A:

The High Court of Tanzania sitting at Kigoma was satisfied that the appellant Amos s/o Wilson @ Sankara Ntiboneka was the person who killed the deceased Philemon s/o Nkarago and that he did so with malice aforethought. The appellant was convicted as charged and sentenced to death by hanging. He has come to this Court on appeal. Mr. Kamaliza Kayaga advocated for him while the Republic/respondent was represented by Mr. Juma Masanja, learned Senior State Attorney.

On the fateful day i.e 10/11/2009 at around 20.30 hrs according to the daughter and wife of the deceased respectively Kenasia d/o Philimon (PW1)

and Mailes w/o Philimon (PW2) they said while the family had just finished taking their meal in a kitchen, suddenly they saw a person armed with a panga arrived and exclaimed that all occupants were under arrest. PW1 and PW2 said they managed to identify the man as the appellant, their neighbour. They were able to do so by the help of a wick lamp which was burning. When Adela Philimon and Regina Philimon who were also family members heard that they were under arrest, they ran away leaving behind the deceased, PW1 and PW2. The appellant hacked the deceased. When PW2 wanted to protect her husband she was also hacked and pushed aside. The appellant turned to the deceased and proceeded to hack him. PW1 and PW2 ran outside and raised an alarm. On hearing the alarm being raised, the appellant took to his heels. While running he flashed a torch forwards PW1 and PW2. When they went inside the kitchen they saw a pool of blood and the deceased was no more. The deceased had multiple cut wounds on his head. The appellant was arrested in the morning.

Initially Mr. Kayaga had lodged a memorandum of appeal consisting of three grounds. He however, dropped one ground so he remained with two grounds. The first was that the evidence of visual identification was not watertight to ground a conviction. Second, the appellant's defence of *alibi* should have been accepted in view of the weak evidence of visual identification. His defence was that on the fateful day and time of incident he

never went out from his homestead. That evidence was supported by his wife and son Mariam d/o Daniel (DW2) and Elphas s/o Amos (DW3) respectively.

Basically Mr. Kayaga argued with force that the conditions prevailing at the scene of crime were not conductive for correct visual identification. He gave incidences why he said so. On the other hand Mr. Masanja supported Mr. Kayaga though at first he was convinced that the appellant was identified. However we shall not give the details of the arguments of Mr. Kayaga at this juncture for reasons which we shall shortly explain.

Having gone through the record, we discovered that the assessors who sat with the trial judge cross-examined the witnesses both of the prosecution and defence. We accordingly drew attention to the learned counsel. Both said that was not proper. Mr. Kayaga said the appellant was not accorded a fair trial as such the entire trial was a nullity. In view of the evidence available, he said the Court should not order a re-trial. Mr. Massanja joined hands with Mr. Kayaga that the proceedings be nullified. He didn't press for a retrial.

From above it is clear that the assessors in the trial cross-examined the witnesses. On our part we would have not bothered if the nature of questions asked by assessors were geared towards clarifying the evidence already given notwithstanding the fact that the record shows they cross examined. The

questions asked raised new matters altogether and tend to test the veracity of the witnesses. That is not within the domain of assessors. In **Abdallah Bazamiye & Another vR,** (1990) TLR 42 this Court said:-

> *"It is not the duty of assessors to cross-examine or re-examine witnesses or the accused. The assessors' duty is to aid the trial judge in accordance with section 265, and to do this they may put their questions as provided for under section 177 of the Evidence Act, 1967. Then they have to express their questions under section 177 of the Evidence Act 1967 other than through the judge, they do so directly, the leave of the judge being implicit in the judge not stopping them from putting their questions. That is, the discretion remains with the judge to prevent the asking of questions which are, for example patently irrelevant, biased, perverse, or otherwise improper.*

In **Mapuji Mtogwashinge VR.,** Criminal Appeal No. 162 of 2015 (CAT – unreported) the Court said:-

> *"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 & TWO OTHERS VR, *Criminal Appeal No. 15 of 2014;* ***MATHAYO MWALIMU AND ANOTHER VR.,*** *Criminal Appeal No. 174 of 2008 and* ***GODLOVE AZAEL @ MBISE VR,*** *Criminal Appeal No. 312 of 2007 (All unreported). In order to play safe we wish to emphasise 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.*

Once it is shown that the assessors have cross-examined witnesses it is taken that the accused have not accorded a fair trial, in particular, it offends one of the principle of administration of justice namely the rule against bias which goes contrary to Article 13(6)(a) of the Constitution of the United Republic of Tanzania. The irregularity is incurable defective (see **Kabula Luhende VR,** Criminal Appeal No. 281 of 2014 and **Kulwa Makomelo & Two Others VR,** Criminal Appeal No. 15 of 2014 (CAT-unreported)).

Now since the irregularity is incurably defective, in the exercise of our revisional powers as provided under S. 4 (2) of the Appellate Jurisdiction Act, Cap 141 R.E 2002, we declare the High Court proceedings a nullity. Normally the proper order to make under the above circumstances is a retrial.

The prosecution case depends solely on the evidence of visual identification. Armed with the principle laid down in **Waziri Amani VR,**

[1980] TLR 250 that no court should act on such evidence unless the possibilities of mistaken identity are eliminated and that the evidence before it is absolutely watertight, let's see whether the appellant was identified at the scene of crime.

Mr. Kayaga as earlier on said that the conditions were not conducive for correct identification. **First,** he said the wick lamp could not have produced a bright light in the circumstances of this case. **Second,** the incident occurred suddenly. **Third,** it is not shown in evidence who responded to the alarm raised though one mwalimu Stephano Rugema "appeared" to have responded and accompanied PW1 to police to report the incident in the very night of the incident but was not summoned as a witness to confirm PW1 to have mentioned the appellant. **Four,** like in point three above no police officer from Mnanila Police came to testify how and what PW1 reported. And Mr. Kayaga could not comprehend and no explanation was given as to why the police at Mnanila did not take any action following the report of the death of the deceased. **Five,** if the appellant was their neighbour, Mr. Kayaga said, why not arrest him on the same night, if really he was mentioned. **Six,** Mr. Kayaga said, familiarity is relevant but only if the conditions were conducive.

The learned Judge was satisfied that PW1 and PW2 were able to identify the appellant through a wick lamp as they had ample opportunity to observe him. To start with the size of the room and the time the assailant spent, we

have the following observation. PW1 and PW2 were not at one on the size of the room. PW1 said it was a small kitchen. She said:-

> *"It was a small kitchen of about 4 x 4 paces."*

On the other hand PW2 when cross-examined she said:-

> *"The killer did not reach where the wick lamp was. We refer to it as kitchen* ***but actually*** *it had two rooms and slept in there. It had two rooms. The wick lamp was at the middle of the two rooms."*

Definitely the two witnesses did not refer to one and the same room. They contradicted each other. Likewise PW1 and PW2 contradicted each other as to the time the assailant spent. PW1 said the incident took about 30 minutes. On the other hand PW2 said it took some minutes.

Apart from these contradictions, if really they saw the appellant and when they raised an alarm people responded why was the appellant, who was their neighbour not arrested on that same night? It is more likely than not that they were unable to identify the appellant because the conditions were not conducive. Indeed familiarity will only hold if the conditions for visual identification were favourable. (See **John Jacob VR,** Criminal Appeal No. 92 of 2009 (CAT-unreported)).

From the foregoing, we are of the settled view that this might be a case of mistaken identify. The benefit ought to be resolved in favour of the appellant. Since the evidence on prosecution is wanting we make no order for a retrial.

The appellant to be released from prison forthwith unless detained in connection with another matter.

Order accordingly.

DATED at TABORA this 4th day of December, 2015.

B.M. LUANDA
JUSTICE OF APPEAL

S.A. MASSATI
JUSTICE OF APPEAL

S. MUGASHA
JUSTICE OF APPEAL

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

THE COURT OF APPEAL OF TANZANIA

P.W. Bampikya
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL