IN THE COURT OF APPEAL OF TANZANIA
AT TABORA

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

CRIMINAL APPEAL NO. 167 'A' OF 2015

ESROM PETRO .....APPELLANT
VERSUS
THE REPUBLIC.....RESPONDENT
(Appeal from the Judgment of the High Court of Tanzania At Tabora)

(Matogoro, J.)

Dated the 6th day of November, 2014
in
Criminal Session No. 109 of 2007
.....
JUDGMENT OF THE COURT

4th & 7th December, 2015
MUGASHA, J.A.:

The appellant and two other persons were charged with murder contrary to section 196 of the Penal Code Cap 16 RE 2002. The information for murder alleged that on 12th April, 2012 at about 19.45 at Msehezi Kirando village in the District and Region of Kigoma, the appellant and two others did murder **STEPHANO S/O MATALILO**.

Facts giving rise to the charge are as follows: On 12/4/2012 around 19.45 hrs at the deceased and his two children **BUCHUMI STEPHANO AND ADHELA STEPHANO** went to his farm for the purposes of squeezing "*Migazi*" palm kernels. At around 19.00 hrs while cooking inside their house at the shamba **BUCHUMI STEPHANO AND ADHELA STEPHANO** heard the

appellant calling their father (deceased). The appellant was accompanied with other accused persons holding pangas and clubs. Soon thereafter, **BUCHUMI STEPHANO AND ADHELA STEPHANO** heard their father lamenting "wanangu nakufa" (my children I am dying). **BUCHUMI STEPHANO AND ADHELA STEPHANO** went outside and found their father being beaten by the appellant and other accused persons. On seeing them the appellant chased them telling other accused that "*washikeni hao tuwaue wasije wakaenda kusema*". (Catch them, we have to kill them so that they do not speak out). **BUCHUMI STEPHANO AND ADHELA STEPHANO** took to their heels to the bush where they spent a night. On the following day, they went to the village to report the matter. The body of deceased was found at the scene burnt and cut on the face and head. The cause of death was **SEVERE BURN WOUND OF 80% DEGREE AND MAJOR WOUND.**

The suspects were arrested and charged with murder. They all denied the charge and after a full trial the appellant was convicted and given death sentence. The other two accused persons were acquitted. Aggrieved, the appellant seeks to challenge the decision of the trial Court. In the memorandum of appeal he has lodged two grounds namely:-

> *(1) That, while the alleged incident leading to conviction and sentence of the appellant took place during the night then the learned trial judge erred in law and fact to convict and sentence the*

appellant basing on such poor identification of the appellant.

(2) *That, the learned trial judge erred in law to convict and sentence the appellant on the information which was not proved beyond reasonable doubt.*

The appellant was represented by Mr. Mussa Kassim, learned counsel and the respondent Republic was represented by Mr. Iddi Mgeni, learned State Attorney.

Mr. Mussa Kassim prayed to add a third ground of appeal pertaining to a procedural irregularity which vitiated the trial because during trial, assessors were allowed to cross-examine the witnesses. The prayer was not objected to by the learned state attorney. We allowed the additional ground because it is on a point of law.

Addressing the 3rd additional ground, Mr. Mussa Kassim learned counsel submitted that, during the trial witnesses for the prosecution and the defence were cross-examined by assessors which was followed by re-examination by counsel for the prosecution and the defence. He submitted that the role of assessors as part of the court is to aid a fair trial but in the event assessors embarked on cross-examination of the witnesses section 177 of the Evidence Act [**CAP 6 RE, 2002**] was contravened. He argued, that was an incurable irregularity and the trial was vitiated which can be remedied in a retrial. However, he was of the view that a retrial is uncalled for because the

conviction of the appellant hinges on weak evidence of visual and voice identification. As such, he urged us to allow the appeal and set the appellant free.

On the other hand, the learned State Attorney conceded to irregularity of assessors being allowed to cross- examine witnesses during trial. He urged the Court to consider the interests of justice and make an order for a retrial to remedy the irregularity.

We wish to observe that, the assessors cross-examined witnesses for both the prosecution and the defence which was followed by the re-examination of the respective counsel. The irregularity starts at page 18 whereby, after PW1 was cross-examined by the learned counsel for the defence, she was cross-examined by the three assessors which was followed by re-examination by the prosecution. As for PW2, the cross examination by assessors appears at page 21 followed by re-examination by the prosecuting state attorney. PW3 was also cross-examined by the assessors from page 23 - 24 which was followed by re-examination by the prosecuting state attorney. PW4 was cross examined by assessors from page 27 – 28 followed by re-examination by the prosecuting state attorney. PW5 was cross-examined by assessors from page 30 – 31 followed by re-examination by the prosecution. The trend of the said irregularity also appears in the defence witnesses who were also cross-examined by assessors which was followed by re-examination by the learned counsel for the defence at pages 47 and 48.

It is clear that in the trial which is a subject of this appeal, assessors were allowed to cross-examine witnesses. The role of assessors in a criminal trial is articulated in section 265 of the Criminal Procedure Act [CAP 20 RE, 2002] which provides:

> *"All trials before the High Court shall be with the aid of assessors the number of whom shall be two or more as the court thinks fit."*

In terms of sections 146 – 147 of the Evidence Act, the examination and cross examination of witnesses is the domain of the parties and not the assessors. This was well addressed in the case of **ABDALLA BAZAMIYE & ANOTHER VS REPUBLIC (1990) TLR 42** where the Court said:-

> *"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 trial judge in accordance with section 265 the CPA and to do so they may put their questions as provided for under section 177 of the Evidence Act."*

In **MATHAYO MWALIMU & ANOTHER VR.**, Criminal Appeal No. 174 of 2008 the court stated that the function of cross examination is the exclusive domain of an adverse party. Moreover, in the recent case of **MAPUJI MTOGWASHINGE VR.**, Criminal Appeal No. 162 of 2015 (Unreported) the Court categorically stated:-

"It is clear 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 during examination in chief."

In view of the stated position of the law the issue for our determination is whether it was lawful for the trial judge to allow assessors to cross-examine witnesses and if so whether the trial was vitiated. In **KULWA MAKOMELO AND TWO OTHERS VR.,** Criminal Appeal No. 15 of 2014 (Unreported) the Court stated that, the law frowns upon the practice of allowing assessors to cross-examine witnesses in any trial in terms of section 177. The Court went further to re-state the purpose of cross-examination and stated as follows:-

"The purpose of cross-examination is essentially to contradict. By the nature of their function; assessors in a criminal trial are not there to contradict. Assessors are there to aid the Court in a fair dispensation of justice."

In the matter under scrutiny, by cross-examining the witnesses, the assessors crossed boundaries and acted beyond the intendment of the legislature which is to assist a judge in a fair trial. Where assessors cross-examine witnesses, they necessarily identify themselves with interests of the adverse party and demonstrate bias which is a breach of one of the rules of

natural justice. The rule against bias which is the cornerstone of the principle of fair trial now entrenched in article 13(6) (a) of the Constitution of the United Republic of Tanzania. **(See KULWA MAKOMELO AND TWO OTHERS VR (supra))**

In the premises, the principle of fair trial was eroded because assessors ceased to be impartial in the eyes of any reasonable thinking person considering that justice must not only be done but seen to be done.

In view of the aforesaid, we are in agreement with learned counsel that cross-examination of witnesses by assessors was an incurable irregularity and the trial was vitiated. This renders the third ground of appeal merited and it is hereby allowed. We nullify the trial proceedings, quash the conviction and set aside the sentence. We further order a retrial of the appellant as we consider that to be in the interest of justice in the circumstances. As this ground disposes the appeal we shall not address the remaining grounds of appeal.

DATED at **TABORA** this 5th 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.

P.W. Bampikya
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL