

**IN THE COURT OF APPEAL OF TANZANIA
AT TABORA**

(CORAM: KIMARO, J. A., MASSATI, J. A. And MZIRAY, J. A.)

CRIMINAL APPEAL NO. 15 OF 2014

1. KULWA MAKOMELO 2. KISENA LUTONJA 3. CATHERINE JOHN	} APPELLANTS
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VERSUS

THE REPUBLIC RESPONDENT

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

(Mruma, J.)

**dated the 20th day of September, 2013
in
Criminal Session No. 37 of 2006**

.....

JUDGMENT OF THE COURT

7th & 9th October, 2015

MASSATI, J.A.:

This is an appeal against the judgment of the High Court (Mruma, J.) sitting at Tabora, in which the appellants were convicted of the offence of murder contrary to section 196 of the Penal Code, and sentenced to death.

The information for murder alleged that the appellants, jointly and together murdered one MAGANGA S/O MGISA on the 6th day of August, 2005, at Mbagwa Village in Nzega District, Tabora Region.

The prosecution case was that, the deceased had two wives. On the fateful night, he was at the junior wife Dotto's house. The senior wife, CATHERINE JOHN, who is the third appellant went to wake him up and informed him of their child's illness. The deceased left the junior wife's house and went to the senior wife's house. The next morning, the junior wife went to the senior wife's house to inquire about the sick child and the whereabouts of their husband. The senior wife told her that he had gone to the house of Pato s/o Ngeleja to pick his bicycle. But that was the last the junior wife heard about their husband. A few days later, the senior wife also disappeared. The matter was then reported to the village authorities.

On visiting the senior wife's house the villagers felt a pungent smell around the house. The door of the house was broken. Upon entering the house, they discovered a mound of sand, on top of which were pots of water. On search they discovered human legs underneath the pile of sand. That was when the matter was reported to the police.

After some investigation, a blood stained axe was recovered from the scene. Blood was also clustered on the walls of the house. The body was then exhumed and identified to be that of the deceased.

The first suspect was the third appellant. She was arrested a few days later as she was preparing to escape. She was in the company of KULWA S/O MAKOMELO, the first appellant.

After completion of the investigation and establishing the cause of death of the deceased, the appellants were charged as aforesaid.

At the preliminary hearing, it was not disputed that the third appellant was the deceased's wife and that on 6/8/2005 she and the deceased took their child to hospital for treatment and returned home. It was also not disputed that since that day, the deceased was never seen again until his dead body was exhumed from the third appellant's house, and the cause of death was severe bleeding following injury by a sharp object. We think that the remaining issues were whether it was the appellants who caused the deceased's death, and if so, whether they did so with malice aforethought.

In order to prove their case, the prosecution fielded three witnesses. Briefly PW1, OJUKWU EMMANUEL, testified that he was a police officer in Nzega. On 27/8/2005, he and his colleagues received a disturbing report from Mbagwa Village. They went to the scene where they found many people around the house. They were in the company of a medical officer. They broke in the compound, and found a dead body buried in one of the rooms of the house, with one leg protruding. They exhumed the body medically examined it, and allowed it to be buried. He also noticed blood splattered in the sitting room. Then investigation began.

On 28/8/2005, information was received, that three suspects had been arrested by the police at Isaka, in Shinyanga. They were brought to Nzega. He identified the suspects as the appellants. On receipt of the suspects, he proceeded to record their cautioned statements, which he admitted and the court received them as Exh P1 B., P2 and P3. PW2 NYERERE GILIGITA, the deceased brother (though not by blood) narrated how he participated in searching for the deceased since he was reported missing, to the day, his body was discovered buried underneath a pile of sand in the third appellant's house.

PW3 JOSEPH NOK NGWELE, was the village Executive Officer. He and the village chairman together with some other villagers were the first to visit the deceased's compound and discovered a strong stench coming from there. Then they dug the pit, only to discover the deceased's body, and some blood splattered on some clothes and plastic bags, together with blood stained axe, pestle, and a hoe handle. The matter was then reported to the police who arrived there on 27/8/2005.

Each of the appellants gave evidence on oath. They retracted their cautioned statements, and denied any knowledge of the death of the deceased. To be specific, the first appellant denied knowledge of the deceased, the second accused or even the 3rd appellant. The second appellant also pleaded ignorance of any knowledge of the offence or even the first or third appellants. On her part, the third appellant admitted that the deceased was her husband. Her defence was that the deceased was killed by some thugs whom she did not identify immediately, who forced their way in the pretext of buying kerosene from the deceased, before hitting him with a heavy object. The thugs then dug a hole in one of the rooms and buried him there before forcing her to elope with them which they did that very night by bicycle. She came to recognize one of the men

the next morning, and that it was the first appellant. She insisted that it was / the first appellant who killed the deceased.

It was on the basis of this evidence that the appellants were convicted.

The appellants have now come to this Court to appeal against the finding of the trial court. At the hearing of the appeal the first appellant was represented by Mr. Mgaya Mtaki, learned counsel, who filed two grounds of appeal. The second appellant was represented by Mr. Kamaliza Kayaga, learned counsel who was prepared to argue three grounds of appeal. The third appellant was represented by Mr. Mussa Kassim, learned counsel who did not file any memorandum of appeal of his own, but the appellant herself had filed a memorandum of appeal comprising four substantive grounds of appeal. The respondent/Republic was represented by Miss Jane Mandago, learned Senior State Attorney. For reasons which shall be clear shortly, we will not reproduce those grounds of appeal as we thought it was unnecessary to go into them.

Before the learned counsel began to submit on their grounds of appeal we asked them to address us on whether it was proper for the trial judge to

Although Ms. Mandago, was at first inclined to the view that the irregularity was curable under section 388 of the Criminal Procedure Act (the CPA) it finally dawned on her that in the light of the principles of fair trial, the assessors showed partisanship by cross-examining, a role, legally played by an adverse party to a proceeding. This could lead to a miscarriage of justice, she argued. So, she too also agreed that the trial be vitiated, but she was of the firm view that the interests of justice demanded that there be an order of retrial.

Given chances to reply the learned counsel for the appellants had nothing to say.

There is no dispute that in this case, the assessors were allowed to cross-examine (or made to appear so) all the prosecution witnesses. What makes matter worse is that, after the said cross-examination, the prosecution was allowed to reexamine the prosecution witnesses. That this is true is reflected on pages 48-49, 54-54 and 59-60 of the record of appeal in the case of prosecution witness. Assessors cross-examination of the appellants after their defences and then reexamination by defence counsel is also reflected on pages 64-65, 67-68 of the record of appeal.

Examination and cross-examination of witnesses is regulated by law. The order in which witnesses are to be examined in court is set out in section 146 of the Evidence Act which is reproduced below for ease of reference:-

S. 146. (1) The examination of a 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.

From the wording of section 146 (2) cross-examination of a witness is the exclusive right of an adverse party. There are some questions which may be put in cross-examination which may not be put in examination in chief. Those are set out in section 155 of the Evidence Act, which again is set out below, for ease of reference:-

S. 155. When a witness is cross-examined, he may, in addition to the questions herein before 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, but injuring his character, although the answer to such questions might tend directly to indirectly to incriminate him, or might expose or tend directly or indirectly to expose him to a penalty or forfeiture.

In view of the above statutory provisions this Court, in a number of its recent decisions, has ruled that it is not permissible for assessors to cross-examine (See **MATHAYO MWALIMU AND ANOTHER vs R.**, Criminal Appeal No. 174 of 2008; **R vs CROSPERY NTAGALINDA @ KORO**, Criminal Appeal No. 73 of 2014; **AUGUSTINE LUDARU vs R.**, Criminal Appeal No. 70 of 2010 and **YUSUPH SYLVESTER vs R.**, Criminal Appeal No. 126 of 2014 (all unreported).

In **MATHAYO MWALIMU's** case the Court said:-

"It is not the duty of assessors to cross-examine or re-examine witnesses or the accused. The assessor duty is to aid the 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".

The rationale for not allowing assessors to cross-examine, was set down in **MATHAYO MWALIMU's** case:-

"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 should not therefore assume the function of contradicting a witness in the case. ...they are there to aid the court in a fair dispensation of justice..."

In conclusion on this part of the judgment, it is clear that the law frowns upon the practice of allowing assessors to cross-examine witnesses in any trial. The next question is, what is the effect of such an irregularity.

Article 13 (6) (a) of the Constitution of the United Republic of Tanzania embodies the principle of fair trial:-

"13 (6) To ensure equality before the law, the state authority shall make procedures which are appropriate or which take into account the following principles namely.

*(a) When the rights and duties of any person are being determined by the court or any other agency, that person shall be **entitled to a fair hearing** and to the right of appeal or other namely against any decision of the court or of any other agency concerned. (emphasis supplied).*

The right to a fair hearing is therefore one of the fundamental rights in this country (See **KABULA LUHENDE vs R.**, Criminal Appeal No. 281 of 2014).

One of the constituents of a fair trial is trial by an impartial tribunal. An impartial tribunal is one that observes the rules of natural justice in its proceedings. One of the rules of natural justice is the rule against bias, be it actual, imputed or apparent. There is actual bias when there is real evidence of bias by one or all members of a tribunal in favour of or against a

party in the proceedings. Imputed bias exists where a member of the tribunal has vested interests in the outcome of the proceedings before the tribunal. Apparent bias exists where, by conduct, the tribunal or member or members of a tribunal show openly to be in favour of or against a party in the proceedings before them.

In the present case, assessors are part of the court; and the court is supposed to be impartial. Since under section 146 (2) of the Evidence Act, cross-examination is the exclusive domain of an adverse party, by allowing assessors to cross-examine witnesses, the court allowed itself to be identified with the interests of the adverse party, and therefore ceased to be impartial. By being partial the court breached the principles of fair trial now entrenched in the Constitution. With respect, this breach is incurable under section 388 of the Criminal Procedure Act.

For the reasons, and on account of this fundamental irregularity, we exercise our revisional powers under section 4 (3) of the Appellate Jurisdiction Act, and revise the proceedings of the High Court. The same are nullified. The conviction is quashed and the sentence is set aside. We order

that the appellants be retried with immediate dispatch before a different judge and different set of assessors.

Order accordingly.

DATED at **TABORA** this 8th day of October, 2015.

N. P. KIMARO
JUSTICE OF APPEAL

S. A. MASSATI
JUSTICE OF APPEAL

R. E. MZIRAY
JUSTICE OF APPEAL

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


Z. A. MARUMA
DEPUTY REGISTRAR
COURT OF APPEAL