IN THE COURT OF APPEAL OF TANZANIA
AT TABORA

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

CRIMINAL APPEAL NO. 159 OF 2015

MASHAKA JUMA NTALULA ....APPELLANT
VERSUS
THE REPUBLIC.....RESPONDENT
(Appeal from the Judgment of the High Court of Tanzania At Tabora)

(Koroso, J.)

Dated the 30th day of October, 2014
in
Criminal Session Case No. 165 of 2012
.....
JUDGMENT OF THE COURT

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

The appellant was charged and 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 appellant murdered one **NSHIMBA S/O NTALULA** on 1st September, 2009 at about 19.00 hrs at Mkweni areas, Wendele village in Kahama District within Shinyanga Region. Brief facts giving rise to the charge are as follows:-

On 01/09/2009, the appellant requested the deceased to take him to Nyasino Igwamanoni village to show the deceased where he lived. On the same day at 18.00 hrs the appellant and deceased disembarked using the motorcycle of the deceased. Thereafter, the deceased was not seen until on

3/9/2009 when the **HELENA MESENJA** the wife of the deceased met the appellant who told her that, they were involved in an accident and the deceased was arrested at Masubwe Police Station. **HELENA MESENJA** followed up the matter at the police but she was told that the deceased was not arrested and later the villagers arrested the appellant and took him to the police station. On 11/9/2009, **HELENA MESENJA** and the police went with the appellant at his residence in Kipunge village where one person recognised the appellant who went to fix the motorcycle and was informed that the motorcycle had been sold to one Lukunja. At the appellant's residence **HELENA MESENJA** identified a trouser and sports shorts belonging to the deceased. On the following day, upon interrogation the appellant admitted to have cut the deceased with a *panga* on the head and he died instantly. He then led them in the wilderness where he had taken the body of the deceased where they found jaws and bones of a human being and a jacket and socks belonging to the deceased. The appellant showed to them the exact place where the killing occurred. The appellant denied the charge. After a full trial the appellant was convicted and sentenced to death.

Dissatisfied, the appellant seeks to impugn the decision of the High Court. In the memorandum of appeal the appellant has lodged basically three grounds namely:-

(1) That, in the absence of post-mortem examination report establishing the death of the victim of the

alleged killing the learned trial judge erred in law and in fact in holding that the appellant committed the offence charged.

(2) *That, the learned trial Judge erred in law in holding that circumstantial evidence irresistibly pointed at the appellant as the person who committed the alleged crime.*

(3) *That, on the totality of the evidence on record the learned trial judge erred in law in holding that the prosecution had proved its case beyond reasonable doubts.*

The appellant who was present in court was represented by Mr. Mugaya Mtaki, learned counsel. The respondent Republic was represented by Mr. Juma Masanja, learned Senior State Attorney. At the hearing of the appeal Mr. Mugaya Mtaki, learned counsel requested and we accepted that he address the Court on the procedural irregularities during the trial. Mr. Mtaki briefly submitted that, in terms of sections 147 – 156 of the Evidence Act [**CAP 6 RE, 2002**] it was not proper for the assessors to cross examine prosecution witnesses which was followed by their re-examination by the prosecution. He also submitted on the irregular recording of evidence of the witnesses which was not in narrative form but in a reported form which is not a known practice. He concluded that, in the light of the said incurable irregularities, the

trial was vitiated and as such, he urged the Court to make an order for a retrial.

On the other hand, Mr. Masanja, learned senior state attorney conceded that, it was not proper for the assessors to cross examine the prosecution witness. Although Mr. Masanja was initially of the view that the defect did not occasion injustice because the prosecution who suffered most had no complaint, on reflection he acceded that in the light of the principles of fair trial, assessors are not permitted to cross-examine the witnesses. He also expressed his discontent on the manner in which the trial Judge recorded the evidence of the witnesses and submitted that, it is not easy to ascertain what was testified by the witnesses during trial. He viewed the procedural irregularities as contravening principles of fairness in a trial and urged us to nullify the proceedings and order a retrial. The learned counsel for the appellant had nothing to reply.

We wish to observe that, the trial court recorded the evidence of ten prosecution witnesses and the appellant who was the sole witness for the defence. At the end of cross-examination by the defence counsel of eight prosecution witnesses, assessors were allowed to cross-examine the witnesses and the prosecution was allowed to re-examine the prosecution witnesses.

The irregularity begins at page 19 of the record whereby in respect at PW1, she was examined by assessors which was followed by re- examination by the prosecution at page 20. As for PW2, examination of assessors appears

from 23- 24 followed by re-examination by the prosecution at page 24. PW3 was also examined by assessors at page 29 and re-examined by the prosecution at page 30. PW4 was examined by assessors from page 34 to 35 and at page 36 re-examined by the prosecution. PW6 was examined by assessors from page 41- 42 and then re-examined by the prosecution. PW8 was examined by assessors and on the same page re-examined by the prosecution. PW9 was examined by assessors on page 60 to 61 followed by re-examination by the prosecution. PW10 was examined by assessors on page 66 to 68 followed by re-examination by the prosecution. In respect of the defence, from page 75 to 76 assessors were allowed to put questions to the witnesses and it was not followed by re-examination by the defence which is proper as we shall later demonstrate.

It is undisputed that, in the matter under scrutiny, the assessors were allowed to cross-examine eight prosecution witnesses. Examination and cross-examination of witness is regulated under section 146 of the Evidence Act [CAP 6 RE 2002] which states:-

> *(1) The examination of a witness by the party who calls him is called his examination-in-chief.*
>
> *(2) The examination of a witness by the adverse party is called his cross-examination.*

(3) The examination of a witness, subsequent to the cross-examination, by the party who called him is called his re-examination."

The cited provision spells out the order in which the witnesses are to be examined during the trial. The order and directions of examinations is provided under section 147 of the Evidence Act which states:

"*(1) Witnesses 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 other 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, cross-examined or, as the case may be, further examined-in-chief or further cross-examined".

What constitutes a subject of cross examination is expressly stated in section 155 of the Evidence Act as follows:

"When a witness is cross-examined, he may, in addition to the questions hereinbefore 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, by injuring his character,

Although the answer to such questions might tend directly or indirectly to incriminate him, or might expose or tend directly or indirectly to expose him to a penalty or forfeiture."

The domain 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".

The role of assessors in a criminal trial is stated under section 177 of the Evidence Act, which provides:

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

In view of the cited provisions, in a criminal trial the examination or cross-examination is by law neither the domain nor the role of the assessors. In **ABDALLA BAZAMIYE & ANOTHER VS REPUBLIC (1990) TLR 42** the Court stated:

"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 non-binding opinions under section 298 of the Criminal Procedure Act, 1985. We might mention here that, in practice, when they put 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."

In the light of the stated position of the law, the question for our determination is whether it was lawful for the learned trial judge to allow assessors to examine witnesses and if so whether the trial was vitiated. In **KULWA MAKOMELO AND TWO OTHERS VS REPUBLIC,** Criminal Appeal

No. 15 of 2014 (unreported), the Court was faced with a similar situation whereby, the trial Judge allowed assessors to cross-examine the witnesses. The Court stated that, it is clear that, the law frowns upon the practice of allowing assessors to cross-examine witnesses in any trial in terms of section 177 of the Evidence Act. In **KULWA MAKOMELO,** digressing the purpose of cross examination the Court went further to hold:-

> *"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."*

As earlier intimated, in terms of section 265 of the Criminal Procedure Act the role of assessor in a criminal trial is to assist the trial Judge. As such, it is incumbent on the trial Judge to properly direct the assessors on their statutory role in assisting the judge so as not to stray into misdirection's or non-directions on vital points vital for the determination of the respective cases resulting into vitiation of such cases. **(SEE MAWEDA MASHAURI MAJENGA@SIMON V. REPUBLIC,** Criminal Appeal No. 292 of 2014 (Unreported)

In the matter under scrutiny, one would assume that, what was put to the witnesses were mere questions but in the form of cross-examination. We are aware that, assessors are allowed to put questions to the witnesses. However, in the case at hand, we are satisfied that the assessors did cross-

examine the witnesses in substance because looking at the answers given by witnesses, it is apparent that questions were geared at testing the veracity and not to seek clarification from the witnesses.

As earlier stated assessors as part of the Court, their role is to assist a judge in a fair trial. As such, it was incumbent on those assessors to exercise impartiality throughout the trial. However, by cross-examining the witnesses, the assessors acted beyond the scope of the intendment of the Legislature which is to assist a judge in a fair trial. They identified themselves with the interested parties to the trial and it was not possible for any reasonable thinking person to view them as impartial. This injured the integrity of justice which is an incurable irregularity. In this regard, we wish to reiterate what we stated in **KULWA MAKOMELO'S** case that:

> *"where assessors cross-examine witnesses, they necessarily identify themselves with the 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 the constitution of the article 13 (6) (a) of the Constitution of the United Republic of Tanzania, 1977".*

We also reiterate what the caution availed by the Court in **MAPUJI MTOGWASHINGE VS REPUBLIC, CRIMINAL APPEAL NO 162 OF 2015** (Unreported) that:

" In order to play safe we wish to emphasise that when a Judge 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"

It is fundamental that justice should not only be done but seem to be done. This is irrespective of the outcome of the trial taking into account that, the fair administration of justice is the exclusive domain of the court which includes assessors who throughout the conduct of the trial must be impartial and not biased. In this regard, the trial which is a subject of the appeal was flawed by incurable irregularity whereby during trial, assessors cross-examined the witnesses.

As rightly observed by the counsel, the trial Judge recorded evidence of the witnesses in the form of reported speech. This was the trend throughout the entire trial but we shall cite a few examples. The evidence of PW1 was recorded as follows:

"She told Mashaka to come home and give them more information. But Mashaka told her that he was still following up on permits. When Mashaka came back he gave them money, she got 15,000/= and her co wife received 5,000/=. Mashaka told them to go back home, they wanted him to take them to where their husband was in custody".

At page 21 the following is evident

> *"PW2 PETER MAKONO – Lives at Butende and has no religion. He is farmer, before than he was a kitongoji chairman Chanyavinyo. As the Kitongoji Chairman his responsibilities included….."*

The recording of evidence in a criminal trial before the High Court is regulated by section 215 of the Criminal Procedure Act which provides:

> *"The High Court may, from time to time, by rules prescribe the manner in which evidence shall be recorded in cases coming before the court and the evidence or the substance thereof shall be taken down in accordance with those rules".*

The respective Rules are the Criminal Procedure (Record of Evidence) (High Court) Rules Government Notices No. 28 of 1953 and 286 of 1956 whereby rule 3 (a) provides:

> *"In all trials of Criminal cases before the High Court the record of the evidence of each witness shall consist of a record or memorandum of the substance of the evidence taken down in writing by the judge,* ***which shall not be ordinarily in form of question and answer but in the form of a narrative."***
>
> (Emphasis supplied)

In the light of the cited rule, the recording of the evidence of the witnesses was not in compliance with the law. We are mindful that, the Rules read

together with the enabling section 215 of the CPA, mandatorily require the recording of the evidence in a narrative form. We are of a considered view that the irregularity has no prejudicial effect and as such, it is curable. However, we find it worthy and compelled to remind judges to comply with the stated Rules in the recording of evidence of witnesses in criminal trials.

We are in an agreement with the learned counsel that, the complaint on assessors cross-examining witness has substance and it was incurably irregular and the trial is flawed. As to the way forward, we accordingly exercise our revision powers under section 4(2) of the Appellate Jurisdiction Act [**CAP 141 RE, 2002**] and quash all proceedings, conviction and set aside the sentence. We however and in the interest of justice order immediate retrial of the appellant before another judge with a different set of assessors.

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