IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

CRIMINAL APPEAL NO. 207 OF 2014

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

EX D. 1995 PC AHAMED ..... APPELLANT
VERSUS
THE REPUBLIC ..... RESPONDENT
(Appeal from the Decision/Judgment of the High Court of Tanzania at Mwanza)

(De-Mello, J.)

Dated 4th day of April, 2014
in
Criminal Appeal No. 136 of 2008

.....

JUDGMENT OF THE COURT

27th & Nov. 3rd December, 2015

KAIJAGE, J.A.:

Before the High Court of Tanzania, at Mwanza, the Appellant pleaded not guilty to a charge of attempted murder contrary to section 211 of the Penal Code. The particulars of the information alleged that between August 23rd and 24th 1997, at Ngudu Police Station, within Kwimba District in Mwanza Region, the appellant attempted to murder one No. D. 4183 P.C. Mohamed.

Consequent upon a full trial, the learned trial judge and the three assessors who sat with her were satisfied that on the whole of the evidence, the prosecution had proved its case against the appellant. Accordingly, the

appellant was found guilty, convicted as charged and sentenced to life imprisonment. Aggrieved, he now appeals to this Court upon a memorandum comprised of four (4) points of grievances.

Before us, the appellant had the services of Mr. Alex Banturaki, learned advocate, while the respondent Republic was represented by Mr. Castus Ndamugoba, learned Senior State Attorney.

When the appeal was called on for hearing, we raised, ***suo motu,*** issues of law touching on what we considered to be serious procedural irregularities attending the trial court's proceedings for which we asked both counsel to give their respective comments. The first issue was whether it was legally permissible for the assessors who aided the trial judge to cross-examine the witnesses. The second issue was whether or not non-compliance, by the trial court, with the provisions of the whole of section 293 (1) and (2) of the Criminal Procedure Act, Cap. 20 R.E. 2002 (the CPA) occasioned a failure of justice.

Addressing the issues we raised, both learned counsel took a common stance by contending that a procedure allowing cross-examination of witnesses by assessors sitting with judges in criminal trials is not sanctioned by the law of the land, stressing that assessors could only be allowed to put

questions to the witnesses. From the record of the trial court's proceedings, learned counsel made reference to instances of assessors being allowed to cross-examine witnesses, asserting that a failure of justice was thereby occasioned and the entire trial court's proceedings vitiated. On this issue alone, we were invited to nullify the trial court's proceedings and order a retrial.

As regards the second issue we raised, both learned counsel submitted that failure on the part of the trial court to hear counsel for the prosecution and the defence and make a ruling on a no case to answer submission as required under section 293 (1) of the CPA, was another irregularity which, according to them, occasioned a miscarriage of justice, just as it vitiated the trial court's proceedings.

Reverting to the first issue, we are in full agreement with both learned counsel representing the parties in this appeal. Going by the record, it is beyond question that instances of court assessors being allowed to cross-examine PW1, PW2 and PW3, witnesses who testified for the prosecution side as well as the accused person (DW1), are clearly reflected on pages 11, 22, 24 and 31. We accept that in a criminal trial, court assessors are not

statutorily mandated to cross-examine witnesses. At an appropriate time in the course of trial, they are allowed to ask questions. (See, for instance, **MATHAYO MWALIMU AND ANOTHER V.R;** Criminal Appeal No. 147 of 2008 and **YUSUPH SYLIVESTER V.R;** Criminal Appeal No. 126 of 2014 (both unreported). This is in line with section 290 of the CPA which provides:-

> *"S.290. 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."*
>
> *[Emphasis supplied].*

So, under the provisions of the above quoted section, it is only the accused person or his advocate who are statutorily mandated to cross-examine witnesses called for the prosecution side. The assessors may put questions to witnesses in tems of section 177 of the Evidence Act (Cap. 6 R.E. 2002) which provides:-

> *"S.177. In cases tried with assessors, the assessors* ***may put any question*** *to the witness, through or by leave of the court, which the court itself might put and which it considers proper."*
>
> [Emphasis supplied].

The rationale for the forecited statutory provisions was lucidly stated thus in **MATHAYO MWALIMU'S** case (supra):-

> *"The purpose of cross-examination is essentially to contradict. That is why it is a useful principle of law for a party not to cross-examine a witness if he/she cannot contradict. By the nature of their function, assessors in a criminal trial are not there to contradict. They are there to aid the court in a fair dispensation of justice. Assessors should not, therefore, assume the function of contradicting a witness in a case. They should only ask him/her questions."*

In this case, looking at the totality of the responses which were made by the witnesses who were subjected to cross-examination by the assessors, we are convinced that the latter thereby assumed the role of contradicting the former. This Court in **EZEKIEL BAKUNDA Vs. R;** Criminal Appeal No. 296 of 2014 (unreported) came face to face with an identical procedural irregularity. In that case, we quoted with approval the holding in **KULWA MAKOMELO AND TWO OTHERS Vs. R;** Criminal Appeal No. 15 of 2014 (unreported) and we thus observed:-

"....by cross-examining witnesses, the assessors as part of the court, thereby necessarily identified themselves with the interests of the adverse party, and demonstrated apparent bias, which was a breach of one of the rules of natural justice "the rule against bias" which is the cornerstone of the principles of fair trial now entrenched in Article 13 (b) (a) of the Constitution of the United Republic of Tanzania."

Be that as it may, we find that by allowing the assessors to cross-examine the said witnesses instead of putting questions in accordance with their statutory mandate, the trial court thereby occasioned a failure of justice and that, by itself, rendered the entire trial court's proceedings a nullity.

We will, finally, address the issue of non compliance with the provisions of subsections (1) and (2) of section 293 of CPA which provides:-

"S.293. (1) When the evidence of the witnesses for the prosecution has been concluded, and the statement, if any, of the accused person before the committing court has been given in evidence, the court, if it considers ***after hearing the advocates for the prosecution and for defence,*** *that there is no evidence that the accused or any one of several accused committed the offence or any other offence of which, under the provisions of section*

300 to 309 of this Act he is liable to be convicted, shall record a finding of not guilty.

(2) When the evidence of the witnesses for the prosecution has been concluded and the statement, if any, of the accused person before the committing court has been given in evidence, the court, if it considers that there is evidence that the accused person committed the offence or any other offence of which under the provisions of section 300 to 309 he is liable to be convicted, ***shall inform the accused person of his right-***

(a) to give evidence on his own behalf; and

(b) to call witnesses in his defence,

and shall then ask the accused person or his advocate if it is intended to exercise any of those rights and record the answer; ***and thereafter the court shall call upon the accused person to enter on his defence*** *save where he does not wish to exercise either of those rights."*

[Emphasis supplied.]

Upon a further study of the trial High Court's record of proceedings we discovered that soon after the closure of the case for the prosecution, the accused person (now the appellant) was prematurely invited to testify in his defence without their being compliance with the mandatory provisions of subsections (1) and (2) of section 293 of the CPA, hereinabove quoted.

Counsel for the prosecution and the defence were thus not heard in terms of section 293 (1), and the trial High Court made no ruling on their respective "no case to answer" submissions. In is also apparent on record that the appellant who had the services of a defence counsel, was called upon to give his defence without the trial High Court fulfilling its mandatory obligations under subsection 2 (a) and (b) of section 293 of the CPA.

To the extent that there was conspicuous non-compliance with the mandatory provisions of section 293 (1) and (2) of the CPA, we would have been impelled to nullify the proceedings which came after the case for the prosecution was closed, but since the appellant enjoyed the services of an advocate who is presumed to know the rights of an accused person and the accused person is expected to be advised accordingly, we have declined to do so. (See; **BAHATI MACKEJA V.R;** Criminal Appeal No. 118 of 2010 (unreported).

However, having earlier made a finding, for reasons given, that the entire trial court's proceedings were vitiated on account of the assessors having been allowed by the trial judge to assume functions outside their statutory mandate, we hereby declare those proceedings a nullity.

Appellate jurisdiction we nullify the entire trial proceedings with an order for an expeditious retrial before a different judge and a new set of assessors.

It is so ordered.

DATED at MWANZA this 1st 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