IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MBAROUK, J.A., MASSATI, J.A. And JUMA, J.A.)

CRIMINAL APPEAL NO. 374 OF 2013

FRANCIS ALEX...APPELLANT

VERSUS

THE REPUBLIC...RESPONDENT

(Appeal from the decision of the High Court of Tanzania

at Dar es Salaam)

(Shangwa, J.)

Dated the 18th day of November, 2011

In

Criminal Session No. 57 of 2009

JUDGMENT OF THE COURT

27th June & 11th July, 2016

JUMA, J.A.:

Francis Alex, the appellant, was in the High Court at Dar es Salaam charged with the offence of murder of the eight year old Jackson Leopord contrary to Section 196 of the Penal Code, Cap 16. After hearing the evidence of five prosecution witnesses and that of the accused person in his own defence, the appellant was convicted. The trial court (Shangwa, J.) concluded that the circumstantial evidence the prosecution levelled against

the appellant, pin-points at his guilt. Upon his conviction, the appellant was sentenced to suffer death by hanging.

Aggrieved by his conviction and sentence, the appellant filed his Notice of Appeal and later the memorandum of appeal to this Court. Later, the appellant`s learned Advocate, Mr. Nduruma Keya Majembe filed a Supplementary Memorandum of Appeal containing five grounds of complaints.

The background facts to this appeal are that 21st day of June, 2007 began just like any other ordinary day in the life of the village of Mgata in Morogoro District within Morogoro Region of Tanzania. Theopista Thobias (PW1), the deceased boy's own mother, and her son; left home in the morning to her farm. After spending the whole day working in the farm, they returned back home around four-thirty in the evening. Once home, the deceased asked for permission to go out and into the near bushes, to check on his birds-traps. Before the boy walked out, PW1 heard the voice from outside. It was the appellant who was inviting the deceased to go out to chew sugar canes. As the deceased left, PW1 remained at home to prepare the family dinner.

The deceased had not returned by the time dinner was ready. PW1 ventured outside to look up for her son. She visited the appellant's house. Before knocking at the door, she called out the appellant's name to ask where her son was. There was some moment of silence before a voice of the appellant shouted back that PW1's son was probably still in the bush checking on his bird traps. PW1 briefly ventured into the bushes, but her son was nowhere in sight. Obviously alarmed, PW1 reported the matter to the local ten-cell leader, one Evarist Isidori (PW2). PW2 assembled members of the local peoples' militia (*Sungu Sungu*). They first visited the bush where the deceased had allegedly set his bird-traps. They then went to the appellant's house.

According PW2 and the militia, from a distance they saw the appellant outside. But soon he retreated back inside his house on the approach of the *Sungu Sungu*. The *Sungu Sungu* forced their way into the house. There was a goat inside the house and they saw blood on the floors. PW2 went out to seek the advice of Lazarus Benedict (PW3) who was the village executive secretary. PW3 advised PW2 to arrest the appellant. An overnight guard was placed on the house to prevent escape.

The following day, PW3 visited the appellant's house who maintained that he knew nothing about the disappearance of the deceased. Despite the denial, PW3 testified that he and other villagers saw blood inside the house and droplets of the same from the house to the appellant's pit-latrine. The appellant was prevailed upon to break open his pit-latrine to retrieve a bloody t-shirt which could be seen from the top. The villagers made a horrific discovery when they found the deceased's head wrapped up in his own vests and underwear buried near the appellant's house. The villagers continued looking for the torso, which was found nearby covered in grass. Even when the police at Matombo interrogated him, the appellant maintained that he had nothing to do with the deceased's death.

In his defence (DW1), the appellant denied the offence. He insisted that on the day the deceased died he left his house at around eleven in the morning to visit his elder brother one Steven Alex. His sister-in-law prepared food which they ate before returning back to his house. It was around six-thirty in the evening when the members of the village militia met him on the road and marched him to his house where they took his goat which he had left tied outside. He was allowed to go inside the house

but at around eight-forty five p.m. the villagers led by PW2 returned and knocked at his door. He was informed that he was under arrest and they guarded his house overnight.

At the hearing of the appeal, the appellant was represented by Mr. Ndurumah Majembe, learned Advocate. Ms. Mkunde Mshanga learned Senior State Attorney, assisted by Ms. Selina Kapanga, learned State Attorney, represented the Republic/Respondent.

Before we allowed Mr. Majembe to begin his submissions, we *suo motu* asked him to address us on the regularity of the trial proceedings wherein the three assessors,— Mwanahawa Mgaya (the first assessor), Emile Chikeki (the second assessor) and Athuman Seif (the third assessor)— were allowed to actively cross-examine witnesses, instead of putting out questions to the witnesses as expected of the assessors under section 177 of the Evidence Act, Cap. 6.

Responding to our concern, Mr. Majembe informed the Court that only earlier that morning, he and the two learned State Attorneys who were waiting for the hearing of the appeal to begin, had a brief discussion over the anomaly and they were unanimous that it was a gross denial of

the appellant's right to fair hearing for the assessors to conduct the cross-examination of the witnesses as they did. The learned Advocate conceded that had he specifically directed his mind to the matter earlier, he would have come up with a ground of appeal to fault the cross-examination role which the assessors played in the proceedings that led to the appellant's conviction.

Mr. Majembe went further to submit that the cross-examination role which the assessors played, infringed the appellant's right to a fair hearing because after the adversity of the cross-examination by the assessors, the trial Judge did not afford the appellant's learned counsel with the opportunity to examine the facts which was elicited after cross examination by the assessors but did so to the prosecution Counsel. In his reckoning, the provisions of section 146 (2) of the Evidence Act, Cap 6 was infringed because the right to cross-examine a witness is exclusively reserved to an adverse party and assessors were not. The relevant section 146 of Cap 6 provides:

> ***"146.**-(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."

Mr. Majembe referred to section 177 of Cap 6 which allows the assessors to put questions but not to cross examine and submitted that the trial Judge erred in law when he allowed the assessors to cross-examine the witnesses. The relevant section 177 of Cap 6 provides:

> ***"177.*** *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 urging us to nullify the proceedings, quash the appellant's conviction and set aside the subsequent sentence of death passed against the appellant, the learned Advocate sought the support of a decision of the Court in **Omary Rashid @ MAKOTI vs. R.**, Criminal Appeal No. 167 "B" of 2015 (unreported). However, he did not support a re-trial but urged us

to order the immediate release of the appellant and leave it at the discretion of the Director of Public Prosecutions to determine whether to initiate fresh charges of murder or not.

Ms. Mshanga, the learned Senior State Attorney expressed her agreement with the submissions made by Mr. Majembe pointing out that by embarking on cross-examination of witnesses the assessors strayed away from their role of assisting the court and became prosecutors. She went further to submit that by the mantle of prosecutors, the assessors eroded the appellant's constitutional right to a fair hearing recognized under Article 13 (6) (a) of the Constitution in as much as after cross-examination by the assessors the appellant was not given any opportunity to rebut but the prosecution benefitted through the opportunity it had of re-examination of the witnesses.

But, having agreed with Mr. Majembe that the trial of the appellant was as a result anything but a nullity, the learned Senior State Attorney did not agree with the contention of the appellant's Counsel that the appellant should walk away as a free man. She urged us to emulate considerations

and circumstances which this Court took into account in **Omary Rashid @ MAKOTI vs. R.** *(supra)* to order a retrial in the following way:

> *"...On our part, having considered the circumstances of the case, particularly the serious nature of the offence and the fact that the irregularity leading to nullification of the proceedings was occasioned by the Court, we are of settled view that for the interests of justice, it is proper to order a retrial...."*

We are in agreement with the submissions of the two learned counsel that the case of **Omary Rashid @ MAKOTI vs. R.** *(supra)* which they cited to us restates what the Court has through its many decisions settled down the law that assessors should not be allowed to cross-examine witnesses. In **Mathayo Mwalimu 2. Masai Rengwa vs. R.,** Criminal Appeal No. 147 of 2008 (unreported) the Court expressly pointed out that— "...in criminal trials assessors do not cross examine. They ask question":

> *"...Before we end this judgment we wish to address one point for future guidance to trial Judges and Resident Magistrates with Extended Jurisdiction. We notice that in this case the trial judge sat with three*

assessors, MARIAM SELEMANI, HADIJA SAID and YUSUF MADAI. That was perfectly in order because in terms of Section 265 of the Act all trials before the High Court are with the aid of assessors the number of which shall be two or more as the court thinks fit. However, in the course of the trial the judge gave room to the assessors to cross examine witnesses. With respect, we think this was wrong. ***In a criminal trial assessors do not cross-examine. They ask questions."*** [Emphasis added].

In **Ramadhani Seifu @ BAHARIA, Jema Omary @ MWENYEKITI & Tujuane Juma @TUJU vs. R.,** Criminal Appeal No. 221 of 2010 (unreported) the Court had the occasion to discuss the essence of section 177 of the Evidence Act that the assessors should only put questions to witnesses. In its discussion, the Court expounded the objectives of cross-examination which are not within the realm of the role of assessors in criminal trials:

"...***The object of cross-examination is to contradict, impeach the accuracy, credibility and general value of the evidence given in chief;*** *to* ***sift the fact already stated by the***

*witness, to **detect and expose discrepancies** or to **elicit suppressed fact which will support the case of the cross-examining party**. We think that this is not what is anticipated in a criminal trial conducted with the aid of assessors. By the nature of their function, assessors in criminal trial are not there to contradict. Their role is 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 (See **Mathayo Mwalimu and another V.R Criminal Appeal No. 147 of 2008 (unreported).** That said, in the case under our consideration, we clearly express that it was wrong for the trial judge to give room to the assessors to cross examine the prosecution witnesses. By doing so, obviously it tremendously tainted the case for the Prosecution."* [Emphasis added].

After perusing the record of proceedings, the concern which we raised *suo motu* became even more apparent. The assessors went far beyond putting questions to witnesses. They invariably contradicted; they impeached the character of witnesses and on several occasions tested the credibility of witnesses, without sparing the accused person.

In the instant appeal before us, the cross-examination by assessors was extensive. We shall illustrate a few examples. The deceased boy's own mother (PW1) was a key witness for the prosecution who was closely cross-examined by the assessors. Responding to cross-examination by the first assessor (Mwanahawa Mgaya) PW1 stated:

> "...*The deceased and the accused used to eat sugar canes together. The deceased's father was not present on the date of the incident. We separated for a long time.* ***On the date of incident, the accused was wearing a T-shirt which has been produced in court****....*" [Emphasis added].

The second assessor (Emile Chikeki) took over in the cross-examination of PW1 in the following way:

> "...*The accused was not specific in answering the question which he was being asked by the sungu sungu men. Sometimes,* ***he remained silent. Sometimes he replied that he killed the deceased alone.*** *Sometimes, he replied that he was together with others.*"

While the appellant was not accorded with the opportunity to rebut adverse evidence elicited from cross-examination by the assessors, the prosecution had the opportunity of re-examination, and took full advantage of the resulting facts elicited from cross-examination. This is clear when PW1 was re-examined-in-chief by Mr. Kimaro (State Attorney):

> *"Yes, the accused used to eat sugar canes with the deceased. It was not a normal action for the one who killed my son to cover his head with his vests and under wear/pant after killing him."*

The first assessor elicited even more detailed information about the inside of the appellant's house than what the prosecution could gather during examination-in-chief. Under cross-examination by the first assessor, Nicholaus Hussein (PW4) stated:

> *"...**We made a search in the accused's house. It had four rooms. We made a search in each room**. We saw a goat tied inside the accused's house. **The place where the deceased's head had been buried is not far from the accused's house. It was almost close**. The accused spent most of the time at Kihonda Morogoro urban. He*

used to come to the village on some occasions. I do not know whether he is of good conduct or bad conduct. The accused and the deceased's mother are related." [Emphasis added].

Even S/SGT Pascal (PW5), the police officer who investigated the case, was not spared from cross-examination by the assessors. Under cross examination by the first assessor, PW5 stated:

> "...***The blood drops I saw had already clotted. There was about 170 metres from the accused person's pit latrine*** *to the place where the deceased's head was found buried."* [Emphasis added].

The second assessor even cross examined PW5 on the accused person's state of mind:

> *"The accused appeared to be not normal when he was brought at the police station."*

In his defence, the appellant (DW1) did not escape from cross examination when he was contradicted when the prosecution evidence was put out to him to respond:

> *"...I did not see the deceased's mother on the date of the incident. It is not true that I murdered the deceased. I was forced to carry the deceased's head to the Police station at Matombo. My T-shirt was not removed from the pit latrine covered with blood stains."*

Responding to the third assessor's cross examination, DW1 stated:

> *"...I did not hear the deceased's mother calling upon me when she was looking for the deceased.* ***I was forced to carry the deceased's head to the Police station.*** *On the date of the incident, I was not together with the deceased. I last saw the deceased on Sunday before I was implicated with this offence.* ***I did not murder the deceased. Those who told the court that they saw blood drops from my house to my pit latrine are liars.****"* [Emphasis added].

In the upshot of the foregoing fundamental irregularity which affected the appellant's right to fair trial for the offence of murder which

attracts the sentence of death by hanging, we are inclined to conclude that the entire trial proceedings are tainted. We accordingly quash and set aside all the proceedings, conviction and sentence in the trial Dar es Salaam High Court Criminal Session No. 57 of 2009.

We order that the matter be remitted back to the trial High Court for a trial *de novo* by another trial Judge and another set of assessors to commence expeditiously.

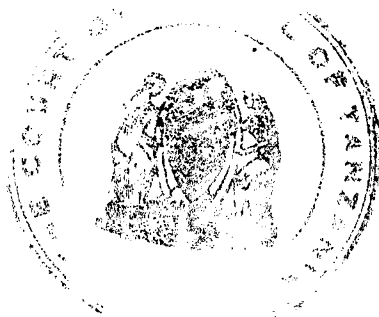
DATED at **DAR ES SALAAM** this 29th day of June, 2016.

M.S. MBAROUK
JUSTICE OF APPEAL

S.A. MASSATI
JUSTICE OF APPEAL

I.H. JUMA
JUSTICE OF APPEAL

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



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