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

**(CORAM: KIMARO, J.A., MUGASHA, J.A. And MZIRAY, J.A.)**

**CRIMINAL APPEAL NO. 69 OF 2015**

**GEOFREY KISHA .....APPELLANT**
**VERSUS**
**THE REPUBLIC.....RESPONDENT**
**(Appeal from the Judgment of the High Court of Tanzania At Sumbawanga)**

**(Mwambegele, J.)**

**Dated the 20th day of November, 2013**
**in**
**Criminal Session No. 32 of 2009**
**.....**

# RULING OF THE COURT

21st & 22nd April, 2016

## MZIRAY, J.A.:

The High Court sitting at Sumbawanga in Criminal Sessions Case No. 32 of 2009, found Geofrey Kisha (The appellant) guilty as charged of the murder of one Musa Chingalawa (the deceased), on 30th august, 2007. He was duly convicted and sentenced to death by hanging.

Dissatisfied with the finding and sentence of the High Court, he has preferred this first appeal in this Court.

In this appeal, Mr. Ladislaus Rweikaza, learned advocate represented the appellant; whereas the Republic/respondent had the services of Mr. Basillius Namkambe, learned State Attorney.

In the course of hearing the appeal, Mr. Ladislaus made a prayer before the Court under Rule 81(1) to make one additional ground of appeal. However before his prayer was entertained, the Court drew the attention to the learned counsel as to whether the course taken by the trial High Court Judge in allowing the assessors to cross-examine the witnesses on both sides of the case was proper.

Both learned counsels were at one that it was not proper for the assessors to cross-examine the witnesses on both sides and that the irregularity vitiated the entire proceedings as that goes against one of the principles of natural justice namely the Rule against bias, and both counsels prayed to the Court to exercise its revisional powers under section 4(2) of the Appellate Jurisdiction Act, [Cap 141 RE: 2002] to quash the proceeding and conviction of the trial Court and set aside the sentence entered against the appellant herein. However, the two differed as to the way forward. Mr. Ladislaus prayed that we order the release of the appellant; on the other hand Mr. Namkambe prayed that we order a retrial.

The record of appeal at pages 13, 14, 17, 25, 26, 27 and 35 shows that after each prosecution witness had finished testifying, the counsel for

the appellant cross-examined that witness. On completion, the assessors took the floor to examine prosecution witnesses. When they had finished, the counsel for the prosecution re-examined some of his witness. That procedure was also followed on the defence case.

It is clear that, in the matter under scrutiny, the assessors were allowed to examine witnesses at the stage of cross-examination which amounted to cross-examination of witnesses. Examination and cross-examination of witnesses 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 trial. The order and directions of examinations is provided under section 147 of the Evidence Act (supra) 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."* (See the case of **Chrisantus Msinga V R**, Criminal Appeal No. 97 of 2015 (Unreported).

In the light of the cited provisions of the law, during trial the examination and cross-examination of witnesses is not the domain of the assessors. In the case of **ESROM PETRO VS REPUBLIC, CRIMINAL APPEAL NO. 167 'A' of 2015 (unreported),** this Court re-stated that, 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."*

During trial their role is articulated under section 177 of the Evidence Act (supra) which states:

*"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 the light of the stated position of the law, the question for our determination is whether it was lawful for the trial judge to allow assessors to cross-examine witnesses and if the trial was not vitiated.

In the case of **Esrom Petro vs R**, (supra) this Court stated *inter alia* that:-

*"...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..."*

Moreover, in the recent case of **MAPUJI MTOGWASHINGE V R.**, 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 the case of **Chrisantus Msinga** (supra) this Court stated *inter alia* that:-

*"...one would assume that, what was put to the witnesses were mere questions but in the form of cross-examination. We are aware that, assessor are allowed to put questions to the witnesses. However in the matter under scrutiny we are satisfied that, the assessor did cross examine the witnesses in form and substance which was geared to test the veracity and not to seek clarification of the testimony of witnesses. Since the role of assessor is to assist the judge in a fair trial, it was incumbent on those assessors to exercise impartiality throughout the trial. However, by cross examining witnesses, the assessors acted beyond the purpose of the legislature which is to assist the judge in a fair trial. Assessors identified themselves with* interested parties to the trial and it was not possible for any reasonable thinking person to view them as

impartial. This eroded the integrity of justice which is an incurable irregularity..."

In the matter at hand, examining witnesses by assessors at the stage of cross examination amounted to cross examination and 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 V R,** Criminal Appeal No. 15 of 2014 (unreported).

In the premises, in the current case 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 of the opinion that it was not lawful for the trial court to allow the assessors to examine witnesses at the stage of cross-examination because that amounted to cross-examining the witnesses, a right which the assessors did not have, hence the trial was flawed by incurable irregularities occasioned by the cross- examination of

witnesses by the assessors, also the said irregularity vitiated the trial. 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 **MBEYA** this 21st day of April, 2016.

N. P. KIMARO
**JUSTICE OF APPEAL**

S. E. A MUGASHA
**JUSTICE OF APPEAL**

R. E. MZIRAY
**JUSTICE OF APPEAL**

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

E. Y. Mkwizu
**DEPUTY REGISTRAR**
**COURT OF APPEAL**