IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

(CORAM: MASSATI, J.A., MUSSA, J.A. And MWARIJA, J.A.)

CRIMINAL APPEAL NO. 167 'B' OF 2015

OMARY RASHID @ MAKOTI.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania

at Tabora)

(Matogolo, J.)

Dated the 3rd day of November, 2014

in

Criminal Session Case No. 76 of 2013

JUDGMENT OF THE COURT

6th & 13th April, 2016

MWARIJA, J.A.:

The High Court, sitting at Tabora, convicted the appellant of the offence of murder and sentenced him to suffer death by hanging. His conviction followed the information filed against him in which he was charged with murder contrary to section 196 of the Penal Code, [Cap. 16 R.E. 2002]. It was alleged that he did, on 20/8/2012, murder one Mary Mathew (the deceased) at Kumwelulo Street, within Kibondo District in Kigoma Region.

The facts of the case can be briefly stated as follows:-

The 20th day of August, 2012 was the last date when the deceased was seen alive. It happened that a day before her death, she had a drinking spree with her friend, Shida Guzubona (PW1). It was from the information received from PW1 that the appellant was later arrested and charged. The evidence of PW1 was to the effect that on 20/8/2012 in the evening, she was drinking liquor with the deceased at the latter's bar known as Nusura. From there, they went to another bar known as Double M Bar where they met the appellant. He sat with them, bought drinks and all of them went on drinking. Later at about 3.00 p.m., PW1 left the place leaving there the deceased and the appellant. On the next day at 10.00 a.m she was arrested in connection with the deceased's death. On being questioned at the Police Station, PW1 narrated the story to the police and the fact that at the time when she left the deceased she was with the appellant.

The prosecution relied also on the evidence of Jumanne Magambo (PW2) whose evidence was to the effect that, in August 2012, he accommodated the appellant on two consecutive days after his request to sleep at PW2's house. According to the witness, he was informed by the appellant that he had misunderstandings with his wife and feared that they

would quarrel if he went home. PW2 was further informed by the appellant that he intended to travel to Kahama.

After a span of time, the appellant was later arrested and according to the evidence of WP 3546 Corporal Frida, he confessed that he murdered the deceased in corroboration with one Swedi and Bebi Barega, a "bodaboda" (commercial motorcycle) rider. The witness tendered a statement which was admitted in evidence. In the statement, she said, the appellant confessed to have committed the offence. The statement, which was repudiated by the appellant was admitted in evidence after a trial within a trial had been conducted. It formed the basis of the appellant's conviction.

In his defence, the appellant denied the allegation that he murdered the deceased. His evidence was that he was arrested on 14/1/2013. While at Police Station, he said, he was tortured and forced to thumb-print a paper. He could not recall whether the paper was blank or had words written on it. He was later taken to the justice of the peace for the purpose of recording his extra-judicial statement. He however refused to do so before the justice of the peace.

The appellant was aggrieved by conviction and sentence and thus preferred this appeal. The memorandum of appeal filed by his learned counsel consists of three grounds:-

> *"1. That the appellant was denied a fair trial as the trial Court allowed the assessors to cross-examine the witnesses and the appellant.*
>
> *2. That the procedure adopted by the trial Court to conduct a trial within a trial was irregular and occasioned injustice to the appellant.*
>
> *3. That the appellant cautioned statement (Exh. P.2) was wrongly admitted in evidence."*

In this appeal, the appellant was represented by Mr. Kamaliza Kayaga, learned counsel while the respondent Republic was represented by Ms. Jane Mandago, learned Senior State Attorney.

Submitting in support of the first ground of appeal, Mr. Kayaga argued that the trial of the case was irregular because the assessors were allowed to cross-examine the witnesses. By so doing, the learned counsel argued, the assessors departed from their role of asking questions with a view of assisting the Court to arrive at a just decision and instead,

ventured into testing the credibility of the witnesses, the function which is the domain of the adverse party. Mr. Kayaga pointed out from the record, examples showing that the assessors cross-examined the witnesses through questions which were not only meant to test their credibility but implicate some of them with the offence. He gave as an example, the questions which PW1 was asked. The relevant parts of the record referred to by the learned counsel are pages 14, 15, 17 and 36. In those pages, he said, the assessors either pinned down the witnesses or questioned their credibility.

The learned counsel argued further that apart from allowing the assessors to cross-examine the witnesses and the appellant, the learned High Court judge also allowed the prosecution to re-examine the witnesses after cross-examination by the assessors while, on the other hand, he did not give to the appellant equal opportunity of re-examining the witnesses.

On these arguments, Mr. Kayaga submitted that the appellant was denied a fair trial. To substantiate his argument, he cited the case of **Maweda Mashauri Majenga @ Simon v. R,** Criminal Appeal No. 292 of 2014 (unreported).

On her part Ms. Mandago stated at the outset that she supported the appeal. She agreed with the submission made by the learned counsel for the appellant that by allowing the assessors to cross-examine the witnesses, the High Court strayed into an error which rendered the proceedings irregular. She added that the assessors stepped into the shoes of the prosecution and therefore, the trial was vitiated because the appellant did not get a fair trial.

With regard to the manner of examining witnesses, Ms. Mandago submitted that the procedure is clearly provided for in the Evidence Act, [Cap 6 R.E 2002]. On the irregularity occasioned by the assessors as a result of departing from their role, the learned counsel cited the case of **Kulwa Makomelo & Anr v. The Republic**, Criminal Appeal No. 15 of 2014 (unreported). She agreed with the learned counsel for the appellant that the irregularity vitiated the trial.

There is no dispute that in this case, the assessors cross-examined the witnesses. They did so to all the prosecution witnesses and to the appellant when he testified in his defence. According to S. 265 of the Criminal Procedure Act, [Cap. 20 R.E. 2002] (the CPA), the role of assessors is to assist the judge in a trial. The section provides as follows:-

"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. [Emphasis added].*

The corresponding section as regards trial of cases by a subordinate Court under extended jurisdiction is section 174 of the CPA which provides that:

"All offences tried under the provisions of section 173 shall be tried with the aid of two or more assessors and in the manner prescribed for the trial of offences by the High Court."

From that position of the law, the purpose of having assessors in a trial is to use them to assist the Court, not any of the parties to the case. It is for this reason that under S. 177 of the Evidence Act [Cap. 6. R.E. 2002], it is provided that:-

"In cases tried with assessors, the assessors may put questions to the witnesses, through or by leave of the judge, which the judge himself might put and which he considers proper."

Clearly therefore, what the assessors are allowed to do is to put questions, not to cross-examine. Interpreting the provisions of S. 146 of the Evidence Act which regulates the order of examining witnesses, this Court had this to say in the case of **Kulwa Makomelo** (supra):

> *"From the wording of section 146 cross-examination of a witness is the exclusive right of an adverse party."*

That position was emphasized in the case of **Maweda Majenga** (supra), cited by Mr. Kayaga where the court stated as follows:

> *"...the position of the law is that while the assessors have a right to put questions to witnesses in a trial, they have no right to cross-examine or re-examine witnesses or the accused."*

Stating the rationale for not allowing the assessors to cross-examine witnesses, the Court in **Kulwa Makomelo case** cited the decision in the case of **Mathayo Mwalimu & Anr, v. Republic,** Criminal Appeal No. 174 of 2008 (unreported) where it was stated that:-

"...the purpose of cross-examination is essentially to contradict. By the nature of their functions 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...."

For the above stated reasons, we agree with the learned counsel for the parties that in this case, the trial was irregular because, by allowing the assessors to cross-examine the witnesses, the appellant was denied a fair trial.

What then is the effect of the irregularity? We have no difficulty in answering that issue. It is a settled position of the law that where in a trial, the assessors were allowed to cross-examine witnesses, the irregularity vitiates the trial. As argued by both counsel for the parties, by cross-examining witnesses, the assessors acted beyond their role, stepping into the functions of an adverse party. The result is, certainly, to render the trial unfair.

In **Kulwa Makomelo case**, the Court observed that, since the assessors are part of the Court and the Court is required to be impartial, once they step into the domain of an adverse party, the Court ceases to be impartial. It stated as hereunder:-

> *" 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 impartial the Court breached the principal of fair trial now entrenched in the Constitution."*

Similarly, in the case of **Amos Wilson @ Sankara Ntibuneka v. The Republic**, Criminal Appeal No. 164 of 2015, it was held that:-

> *" Once it is shown that the assessors have cross-examined witnesses it is taken that the accused have not [been] accorded a fair trial, in particular, it offends one of the principles of administration of*

justice namely the rule against bias which goes contrary to Article 13(6) (a) of the Constitution of the United Republic of Tanzania. The irregularity is incurable... (see ***Kabula Luhende v. Republic,*** *Criminal Appeal No. 281 of 2014 and* ***Kulwa Makomelo & Two Others v. Republic,*** *Criminal Appeal No. 15 of 2014 (CAT – Unreported.)"*

On the basis of the above stated position, we find that the trial was a nullity. Having so found, we do not find it necessary to consider the other two irregularities raised by Mr. Kayaga, learned counsel. In the event, we hereby nullify the proceedings, quash the appellant's conviction and set aside the sentence.

The final issue for determination is whether or not, we should order a retrial. Mr. Kayaga urged us not to do so. On the other hand, Ms. Mandago left the matter to the decision of the Court. 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 the settled view that for the interests of justice, it is proper to order a retrial. We therefore

assessors.

DATED at TABORA this 12th day of April, 2016.

S.A. MASSATI
JUSTICE OF APPEAL

K.M. MUSSA
JUSTICE OF APPEAL

A.G. MWARIJA
JUSTICE OF APPEAL

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

P.W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL