IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

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

CRIMINAL APPEAL NO. 136 OF 2015

ANDREA MEKO ..... APPELLANT
VERSUS
THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Mwanza)

(De-Mello, J.)

dated the 24th day of February, 2015
in
Criminal Sessions Case No. 9 of 2010
.....

JUDGMENT OF THE COURT

21st & 25th October, 2016

RUTAKANGWA, J.A.:

This is an appeal from the High Court judgment in Mwanza Criminal Sessions Case No. 9 of 2010, dated 24/02/2015. The appellant was charged with murder c/ss 196 and 197 of the Penal Code Act, Cap 16 R.E. 2002. It was alleged that, on 18th November, 2007 at Nzera village within Geita District in Mwanza Region, he did murder one Leokadia d/o Samson. He denied the charge and was tried, found guilty as charged and convicted. He was sentenced to suffer death by hanging. Aggrieved by the conviction and sentence, he has preferred this appeal.

In this appeal, the appellant was represented by Mr. Salum Amani Magongo, learned advocate, who had lodged a memorandum of appeal containing six grievances. However, when the appeal came before us for hearing he, correctly, contented himself with only the 4th and 6th grounds of appeal on which he made a brief but focused submission.

The 4th and 6th grounds of appeal read as follows:-

> *"4. That the trial court erred in law by permitting the assessors to cross-examine the witnesses.*
>
> *5. That as a whole the evidence on record was Insufficient to warrant a conviction."*

In elaborating on these grounds of complaint, Mr. Magongo placed much reliance on sections 177 and 147 (1) of the Evidence Act, Cap 6 R.E. 2002 ("the Evidence Act"). He also made reference to section 265 of the Criminal Procedure Act, Cap 20 R.E. 2002 ("the CPA").

Section 265 of the CPA 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."*

Sections of 147 (1) and 177 of the Evidence Act read thus:-

"147 (1) Witnesses shall first be examined-in-chief, then (if the adverse party so desires) cross-examined, then (if the party calling them so desires) re-examined.

177. In cases tried with assessors the assessors may put any questions to the witnesses, ***through or by leave of the court, which the court itself might put*** *and which it considers proper."* [Emphasis provided].

We believe that one cannot fully appreciate the seriousness of Mr. Magongo's complaint without having in mind, the provisions of section 146 of the Evidence Act. The entire section is in the following terms:

"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."

It is crystal clear from section 146(2) that the right to cross-examine any witness in any judicial proceeding, be it civil or criminal, is the exclusive preserve of the adverse party. This is because the primary object of cross-examination is to discredit a witness. It would be a risible matter to have a party impeach the credibility of his own witnesses and yet expect to emerge successful. In so saying, we should not be taken to be oblivious of the provisions of s. 164(1) of the Evidence Act which permits a party to cross-examine his witness **but with the consent of the court,** for the purpose of impeaching him if the witness turns hostile. But all in all, these provisions of the Evidence Act do not allow the court, that is, the trial judge/magistrate and assessors to cross-examine. If they do so they will be jettisoning to the winds one of the basic attributes of a fair trial guaranteed under our Constitution and other International Covenants: IMPARTIALITY.

In his brief submission, Mr. Magongo reproached the learned trial judge for allowing the assessors, who were supposed to aid her in the trial of the appellant, to cross-examine the witnesses for the prosecution and the defence. In support of this, he referred us to pages 5, 13, 21 and 22 at which it is patent that the three assessors cross-examined the only two prosecution witnesses and the appellant who was the only defence witness.

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Armed with this glaring irregularity, Mr. Magongo confidently and strongly contended that since the assessors played a partisan role, the trial of the appellant was not conducted with the aid of assessors as mandatorily required under section 265 of the C.P.A. Relying on our decision in **Tulubuzya Bituro v. T.,** [1982] T.L.R. 264, he pressed us to nullify the trial of the appellant, quash and set aside the conviction for murder and the death sentence. According to him, since there was no reliable evidence on record to prove the prosecution case, he urged us not to order a re-trial but set the appellant free.

Mr. Magongo's submission got overwhelming support from the respondent Republic. Ms. Revina Tibillengwa, learned Senior State Attorney for the respondent, fully associated herself with the views of Mr. Magongo. She was of the firm view that the undisputed irregularity vitiated the appellant's trial and she, too, was of the considered opinion that it would not be in the interests of justice to order a re-trial. She took this stance because the only evidence going to implicate the appellant came from PW1 Makucha chief. It was her strong argument that the evidence of PW1 Makucha lacked cogency as it was based on information he had allegedly received from one Boniface, who never testified, that it was the appellant who had killed the deceased.

After objectively considering the submissions of both counsel and scrutinizing the evidence of PW1 Makucha, we have found ourselves increasingly of the view that the appellant did not get a fair trial. The assessors having arrogated to themselves, with the apparent blessings of the learned judge, the role of cross-examining witnesses, we are holding without any demur that the appellant was not tried by an impartial court.

This Court has persistently and consistently held that *"assessors are there to aid the court in a fair dispensation of justice"* (**Mathayo Mwalimu and Another v. R**, Criminal Appeal No. 147 of 2008 (unreported)). In **Kulwa Makomelo and Two Others v. R.**, Criminal Appeal No. 15 of 2014 (unreported), we partly held as follows: -

> *"...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."*

See, also, **EXD. 1995 PC Ahmed v. R**, Criminal Appeal No. 207 of 2014, **Geofrey Kisha v. R**, Criminal Appeal No. 69 of 2015, **Ezekiel s/o Bakunda v. R**, Criminal Appeal No. 296 of 2014 (all unreported), among many others.

In view of the firmly entrenched legal position barring assessors from cross-examining witnesses of any side in any trial with the aid of assessors, we accede to the submission of both counsel in this appeal. We nullify, quash and set aside the appellant's trial and conviction for murder as well as the death sentence imposed on him. As it is clear that it will not be in the interests of justice to order a re-trial for the reasons articulated by Ms. Tibilengwa, we order the appellant's immediate release from prison unless he is otherwise lawfully held.

DATED at **MWANZA** this 22nd day of October, 2016.

E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

S.A. MASSATI
JUSTICE OF APPEAL

S.E.A. MUGASHA
JUSTICE OF APPEAL

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

P.W. Bampikya
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL