IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

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

CRIMINAL APPEAL NO. 354 OF 2015

1. **CHACHA GHATI MWITA** ..... **1ST APPELLANT**
2. **THOMAS SALIMA MARWA @ KYANGWI SALIMA** .....**2ND APPELLANT**

VERSUS

THE REPUBLIC ..... **RESPONDENT**

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

(Sumari, J.)

dated the 15th day of December, 2014
in
H/C Criminal Sessions Case No. 34 of 2012
.....
JUDGMENT OF THE COURT

24th & 27th October, 2016

RUTAKANGWA, J.A.:

The appellants were arraigned on a charge of murder. Before the High Court sitting at Tarime, it was alleged that on 25th October, 2008, at Twiga Guest House, Tarime, they murdered one Veronica d/o Bernard.

The appellants, though not disputing the murder of Veronica, denied the charge. The prosecution, therefore, assumed the duty of proving beyond reasonable doubt the charge against the appellants. To discharge this task, the prosecution called three witnesses, namely PW1 Silvia Munanka Matiku, PW2 Magdalena Thomas and PW3 E 6593 D/Cpl. James.

Of the three, it was only PW1 Silvia who purported to have eyewitnessed the murder of Veronica ("the deceased") at the hands of the appellants.

On their part, the appellants totally distanced themselves from the admittedly brutal murder of the deceased. They claimed not to have been nearer the scene of the murder on that day.

The trial in accordance with the mandatory provisions of section 265 of the Criminal Procedure Act, Cap 20 R.E.2002, was conducted with the aid of three assessors. At the conclusion of the trial the assessors gave various opinions. Contrary to the holding of the learned trial judge that all assessors were unanimous on the guilty verdict, the 1st assessor had opined that the appellants were not guilty. The 2nd assessor was ambiguous. While he found the first appellant guilty as charged, he opined that the second appellant was only guilty of robbery. It was the third assessor who found the charge against both appellants proved to the hilt. This confusion aside, the learned trial judge was settled in her mind that the guilt of the appellants was proved to the required standards. She accordingly found them guilty, convicted them as charged, and sentenced them to suffer death by hanging. It is this conviction and sentence which has triggered this appeal by the appellants.

In this appeal, the appellants were represented by Mr. Silvery Byabusha (for 1st appellant) and Mr. Wilbard Butambala (for 2nd appellant), learned advocates. Both learned counsel had identical grievances against

the trial of the appellants and the decision of the High Court. These were to the effect that:

(a) *The court assessors cross-examined the witnesses for both sides contrary to the dictates of the law.*

(b) *The learned trial judge erred in law in misdirecting the assessors on the law on circumstantial evidence and non-directing them on the defence of alibi.*

(c) *The prosecution case was not proved beyond reasonable doubt.*

Mr. Byabusha was the first to address us in support of these grounds of appeal. It was his strong contention which was subsequently supported by Mr. Butambala and Mr. Victor Karumuna, learned Senior State Attorney for the respondent Republic, that the learned trial judge committed an incurable error of law in not addressing the assessors on the issue of the defence *alibi* which the appellants had fronted to protest their innocence.

All counsel were agreed that it is trite law that failure to address the assessors at all or adequately on a vital point of law, such as the defence of *alibi,* vitiates the entire trial. They accordingly urged us to nullify the trial of the appellants. On this, counsel relied on this Court's decisions in the cases of:-

(a) ***Tubuluzya bituro v. R.,*** *[1982] T.L.R. 264. and*

(b) ***Marwa Joel Gesabo v. R.,*** *Criminal Appeal No. 172 of 2012 (unreported).*

On the issue of the assessors cross-examining the witnesses, counsel were of one accord that that was an incurable irregularity as the impartiality of the assessors was compromised. On this account, they also invited us to nullify the trial of the appellants.

As alluded to above, it is not disputed that the assessors cross-examined all the witnesses for the prosecution and defence. We have studied the answers given by the witnesses in response to the questions put to them by the assessors and we have no flicker of doubt, that most of them were meant to contradict the witnesses. This, in our respectful opinion, went beyond the mandate given to assessors to put questions to witnesses by section 177 of the Evidence Act, Cap 6 R.E. 2002.

We believe that we have abundantly made ourselves very clear in many of our judgments on the role of assessors in trials before the High Court. In **Ezekiel s/o Bahunda v. R.,** Criminal Appeal No. 296 of 2014 (unreported), we lucidly pronounced ourselves thus:-

> *"...after reviewing all the literature on the subject we concluded ...*

'it is clear that the law frowns upon the practice of allowing assessors to cross-examine witnesses in any trial.'

And that this was because, although assessors may be allowed to put questions to witnesses under section 177 of the Evidence Act:

'it is not the duty of assessors to cross-examine or reexamine witnesses or the accused. The assessors' duty is to aid the judge in accordance with section 265 (of the Criminal Procedure Act)

And more so, because:-

'the purpose of cross-examination is essentially to contradict. By the nature of their function assessors in a criminal trial are not there to contradict. Assessors ... are there to aid the court in a fair dispensation of justice.'

*In **MAKOMELO'S** case we further held that 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 (6) (a) of the Constitution of the United Republic of Tanzania. We thus agree with both learned counsel that this complaint has substance. In view of the above discrepancies, the whole trial is vitiated."

The glaring omission of the learned trial judge to direct the assessors on the issue of *alibi,* need not unnecessarily detain us. The law is trite that failure to address the assessors on a vital point of law, such as *alibi*, as correctly argued by all counsel in the appeal, vitiates the trial.

In this case the assessors were not addressed on the defence of *alibi* and what it entails. It's no wonder then that the two assessors who came up with guilty verdicts rejected the *alibi* defence because the appellants did not proffer witnesses to support this defence. It can therefore not be seriously argued that the appellants were not prejudiced by the non-direction.

On account of these two irregularities, we join hands with the three learned counsel and hold that the trial of the appellants was a nullity. We accordingly quash the trial of the appellants and set it aside as well as the judgment and death sentence.

After nullifying the appellants' trial, under normal circumstances we would have ordered a re-trial. Counsel for all parties have pressed that a

re-trial in this case would not serve the interests of justice. They were of this opinion because the visual identification evidence of PW1 Silivia was totally unconvincing. After perusing the evidence of the three prosecution witnesses, we have found ourselves constrained to agree with them.

Admittedly, the conviction of the appellants was predicated on the purported identification of PW1 Silivia, who was injured in the assault and had testified that the two appellants had been well known to her prior to the fateful incident. That might as well have been true. She went on to testify that she had recognized the appellants among the robbers who in the course of committing the robbery murdered Veronica. She further testified that although she had been seriously wounded, she named the two appellants to her co-worker, PW2 Magdalena. On this, she was twice belied by PW2 Magdalena.

While under examination-in-chief, PW2 Magdalena had said:-

> *"...so I opened the door and found Silivia sleeping down (sic) oozing blood. One Mwita got hold of Silvia. I asked Silivia where is Vero. She said Vero is already dead, and 'uje umwambie mama yangu waliotuua ni wa Burega'. I then ran away."*

From this piece of uncountradicted prosecution evidence it is clear that PW1 Silvia did not name the appellants to PW2 Magdalena, as she had claimed in

her evidence. She had only told her that their murderers hailed from Burega.

PW1 Magdalena further exposed PW1 Silvia's lies while under cross-examination. She said:-

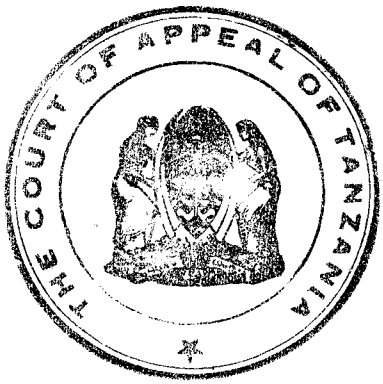
> *"Silivia did not tell me who were they. She told me they needed me. The one with a gun had a cap hat."*

From this evidence, it is clear to us that PW1 Silivia never immediately named the appellants to anybody, leave alone PW2 Magdalena. If she did not do so, it means she did not recognize any of the bandits-cum-murderers. If PW1 Silivia had recognized the appellants among the robbers and named them immediately, it could not have taken about two years to arrest them, when there is no scintilla of evidence on record to suggest that they had been on the run. And, surprisingly, no iota of evidence was tendered by the prosecution to show who arrested the appellants and why. See, for the instance **Yassin Hamisi Ally @ Big v. R.,** Criminal Appeal No. 254 of 2013 (unreported).

Since the only purported eyewitness identification evidence against the appellants smacks of figment of her own imagination, we are also of the respectful opinion that ordering the re-trial of the appellants would be tantamount to a persecution.

In fine, we allow this appeal in its entirety and order the immediate release from prison of the appellants unless they are otherwise lawfully detained.

DATED at **MWANZA** this 25th 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