IN THE COURT OF APPEAL OF TANZANIA
AT MBEYA

(CORAM: OTHMAN, C.J., KIMARO, J.A. And MUGASHA, J.A.)

CRIMINAL APPEAL NO. 102 OF 2014 c/w

CRIMINAL APPEAL NO. 103 OF 2014

BETWEEN

BARAKA JAIL MWANDEMBO.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Karua, J.)

dated 12th day of November, 2013

in
Criminal Case No. 16 of 2012

JUDGMENT OF THE COURT

22nd & 27th April, 2016

OTHMAN, C.J.:

The appellant, Baraka s/o Jailo Mwandembo and one Zuberi s/o Jailo Mwila were arraigned before the High Court of Tanzania at Mbeya for the offence of murder c/s 196 of the Penal Code, Cap 16 R.E. 2002. The prosecution had alleged that on 21st January, 2010 at Bulyaga village, Tukuyu District, Mbeya Region, they had jointly murdered Ester d/o Saulo, a child five years of age. Following a trial, the High Court (Karua, J.) acquitted the appellant of the offence of murder, c/s 196 of the Penal

Code, substituted it with a conviction for the offence of manslaughter c/s 195 of the Penal Code and sentenced him to a term of thirty-five years imprisonment. It acquitted his co-accused.

Aggrieved, the appellant preferred Criminal Appeal No. 102 of 2014. The respondent Republic equally dissatisfied with the appellant's conviction and sentence, instituted Criminal Appeal No. 103 of 2014.

At the hearing of the appeal, where the two appeals were consolidated by the Court under Rule 69(1) of the Court of Appeal Rules, 2009 Mr. Victor Mkumbe and Mr. Ladislaus Rwekaza, learned Advocates represented the Appellant. The respondent Republic was represented by Mr. Francis Rogers, learned State Attorney.

Before embarking on an in-depth consideration of the grounds of appeal submitted by the parties, the Court, *suo motu*, inquired from both Mr. Mkumbe and Mr. Rogers whether there was any serious irregularity in the conduct of the trial at the High Court in view of the participation and role of the three assessors in the proceedings leading to the appellant's conviction.

Mr. Mkumbe, succinctly submitted that the conduct of the trial had problems as the assessors had cross-examined PW1 (Gloria Thom Machuve), PW4 (Superintendent Henry Kisima), PW6 (Inspector Isaya Bwire), DW3 (Sabirania Baraka) and DW4 (Mariam Tweve). They had no authority, he urged, to cross-examine the witnesses. This rendered the trial a nullity, for which there could be no competent appeal before the Court. Reliance was placed on **Chrisantus Msinga V.R.**, Criminal Appeal No. 97

of 2015 (CAT, unreported). He invited the Court to invoke its revisional jurisdiction under section 4(3) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2002 in respect of the consolidated appeal in order to quash and set aside the High Courts' trial proceedings, conviction and sentence.

On his part, Mr. Rogers readily conceded. He emphasized that the assessors had also cross-examined DW2 (Marieta Saulo), PW5 (D.2385 D/SM Richard), DW1 (Baraka Jailo Mwandembo) and DW2 (Zuberi Julius Mwila) in addition to the witnesses spelt out by Mr. Mkumbe.

Mr. Rogers went on to fault another serious irregularity in the trial court's proceedings. He submitted that the High Court did not comply with section 293(2) of the Criminal Procedure Act, Cap. 20 R.E. 2002. At the close of the prosecution case, the learned Judge did not inform the appellant of his right to give evidence on his own behalf and to call witnesses in his defence before calling him to give his defence, as he was required to do under section 293(2).

Having considered the whole matter and in particular, the points raised in the lucid submissions by Mr. Mkumbe and Mr. Rogers, we are of the settled view that the consolidated appeal can be properly determined on the two subjects discussed, without the burden of canvassing the other grounds of appeal.

Going by the record, on 18/09/2013, three assessors were under section 285(1) of the Criminal Procedure Act selected by the trial court without any objection by the appellant and his co-accused, to "**aid**" the High Court in the trial as is mandatorily required under section 265 of that

Act. The learned Judge explained to the assessors their task and what was to be expected of them at the conclusion of the case.

A close scrutiny of the record clearly bears out that the 1st, 2nd and 3rd assessor cross-examined PW2, who was one of the prosecution's key witnesses and PW3; the 1st and 2nd assessor cross-examined PW 5 and did the same in respect of DW1 (i.e. the appellant) and DW2. The assessors were also given an opportunity by the learned Judge to cross-examine PW1, PW4, PW6, DW3 and DW4, but they had nothing to ask or probe.

Now, section 177 of the Evidence Act, Cap 6 R.E. 2002 provides:

> *"**In cases tried with assessors, the assessors may put any question to the witness**, through or by leave of the court, **which the court itself might put** and which it considers proper" (Emphasis added).*

On the other hand, section 146(2) of the Evidence Act states that the examination of a witness by the adverse party is called cross-examination. Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested (**Davis v Alaska**, 415 U.S. 308, 316 (1974). As correctly explained by the Australian Law Reform Commission:

> *"Cross-examination is a feature of the adversarial process and designed to let a party confront and undermine the other party's case by exposing deficiencies in a witness' testimony (ALRC (102) 2005, Uniform Evidence Law, para 5.70).*

By section 155(a) and (c) of our Evidence Act when a witnesses is cross-examined he may also be asked questions which tend to test, respectively, his veracity or to shake his or her credibility, by injuring his character.

In our respectful view, it is one thing for assessors to put questions to witnesses during a trial in order to seek any clarification in the testimony volunteered by the witnesses, which is perfectly acceptable under section 177 of the Evidence Act; it is another thing all together, for them to cross-examine witnesses to test the veracity of their testimony or to shake their credibility, by injuring their character, which is beyond their remit. It is not without a reason that section 177 of the Evidence Act is explicit that the questions that may be put by assessors to the witnesses are those which the court itself might put. It is a cardinal principal of law that the court must be fair and impartial. Assessors are not authorized to cross-examine a witness under either section 146(2) of the Evidence Act or section 265 of the Criminal Procedure Act as they cannot serve as an adverse party in a criminal trial. Their statutory role under section 265 is to "aid" the court in a fair, impartial and just determination of the criminal case.

In our considered view, the assessors' searching cross-examination of PW2, PW3, PW5, DW1 and DW2 on critical matters at issue in the trial and their search for facts from these witnesses, which tended to test the veracity of their evidence or credibility, not only exceeded their mandate and role, but also usurped the adverse party's (i.e. respondent) right to cross-examine those witnesses. With respect, the High Court which under section 177 of the Evidence Act is enjoyed to oversee the questions that

the assessors may put to witnesses, allowed them to wander into cross-examination and in a line of questioning disallowed by the law. The lay assessors' cross-examination, completely innocent as it may have been, offended section 177 of the Evidence Act and surpassed the role ascribed to them in aiding the court under section 265 of the Criminal Procedure Act.

In **Chrisantus Msinga's case** (*supra*), we stated:

> *"during trial the examination and cross-examination of witnesses is not the domain of the assessors".*

Furthermore, in **Kulwa Makomelo and Two Others V.R**, Criminal Appeal No. 15 of 2014 (CAT, Unreported), we held:

> *"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".*

All considered, we fully agree with Mr. Mkumbe that the serious irregularity shown above is incurable. It went to the very root of the trial, and rendered the proceedings a nullity.

Next, we advert to the High Court's omission to direct itself on section 293(2) of the Criminal Procedure Act, which provides:

> *"293(2) when the evidence of the witnesses for the prosecution has been concluded and the statement, if any, of the accused person before the committing court*

has been given in evidence, ***the court****, if it considers that there is evidence that the accused person committed the offence or any other offence of which, under the provisions of section 300 to 309 he is liable to be convicted,* ***shall inform the accused person of his right-***

(a) to give evidence on his own behalf; and

(b) to call witnesses in his defence,

and shall then ask the accused person or his advocate if it is intended to exercise any of those rights and record the answer; and thereafter the court shall call on the accused person to enter on his defence *save where he does not wish to exercise either of those rights". (Emphasis supplied).*

In **Chrizant John V.R**, Criminal Appeal No. 313 of 2015 (CAT unreported) we explained that:

"the broad purpose of [s.293(2)] is essentially to let the accused know that he has the right to defend himself. That includes the manner in which to do so, as well as the right to call witnesses, if any".

We agree with Mr. Rogers that at the close of the prosecution case, on 24/9/2013, the learned Judge completely failed to direct himself on section 293(2) and instead went straight and permitted the appellant, who

was represented Mr. Mkumbe to enter on his defence, which he did and on oath. Thereafter, DW3 his wife testified in his favour.

With respect, we agree with Mr. Rogers that the omission in affording the appellant his rights under section 293(2) of the Criminal Procedure Act was another serious irregularity. The appellant's rights were neither conveyed directly to him by the court or indirectly through or by his advocate (See, **Bahati Makeja V.R.**, Criminal Appeal No. 118 of 2006 (CAT, unreported). The learned Judge could not have recorded any answer from the appellant or his advocate as he was required to, for there was none, given the trial court's non-direction on section 293(2).

In **Melkizedeki Mkuta V.R.**, Criminal Appeal No. 17 of 2006 (CAT, unreported) where the High Court too completely omitted to direct itself in informing the accused his rights under section 293(2) of the Criminal Procedure Act, which is couched in mandatory terms, we held that one major effect of the failure to do so was that there was no fair trial. We note that this decision was delivered on 7th May, 2010 before the decision of the Full bench in **Bahati Makeja's case** (*supra*) rendered on 30th December, 2010, which now governs the interpretation of section 293(2).

In view of the conclusion we are about to arrive at, we also agree with Mr. Rogers that this discrepancy in the High Court's proceedings was worth referring to in this appeal, for which we draw the High Court's attention and re-emphasize the imperative for its due observation.

In the final analysis and for all the above reasons, given the incurable irregularity in the trial proceedings caused by the assessors' cross-

examination of the witnesses for both the prosecution and the defence, which occasioned a miscarriage of justice, we are constrained to invoke our revisional jurisdiction under section 4(3) of the Appellate Jurisdiction Act, which we hereby do. Accordingly, we proceed to quash the High Court's proceedings with effect from 18/9/2013 up to the conclusion of the trial, on 12/11/2013, and set aside the appellant's conviction and sentence. For the avoidance of doubt the preliminary hearing remain unaffected. To better meet the ends of justice and in its interest, we order a retrial to be conducted with dispatch before another Judge of the High Court with a different set of assessors.

DATED at **MBEYA** this day of 25th April, 2016.

M. C. OTHMAN
CHIEF JUSTICE

N. P. KIMARO
JUSTICE OF APPEAL

S. E. A. MUGASHA
JUSTICE OF APPEAL

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

E. Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL