IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

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

CRIMINAL APPEAL NO. 97 OF 2015

CHRISANTUS MSINGI ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania At Sumbawanga)

(Sambo, J.)

Dated the 6th day of March, 2015
in
Criminal Session Case No. 53 of 2012

.....

JUDGMENT OF THE COURT

6th & 11th April, 2016

MUGASHA, J. A.:

The appellant was charged with murder contrary to section 196 of the Penal Code **[CAP 16 R.E. 2002].** The information for the murder alleged that, on 16th October 2011 at Kilangawana village within Sumbawanga district in Rukwa Region did murder one Alfred s/o Masauni. Brief facts giving rise to the charge are as follows: On 16/10/2011 the deceased together with other villagers were at a local pombe club drinking local brew. At about 22.00 hrs, the deceased disembarked heading to his residence. While on the way to his residence, he was stabbed with a knife in the stomach by the appellant who

was the chairman of the Hamlet who had earlier on told the deceased to depart from the village because he was unwanted. **MARIETHA NJIWA (PW4) and IMACULATA CHUPA (PW5)** who were together with the deceased on their way from the pombe club, eye witnessed the appellant who followed them from behind, struck the deceased at the back of his head and after he fell down, he was again stabbed on the stomach by the appellant. **PRISCA KANUSA (PW1), SEBASTIAN CONSTANTINO DHIPU 21 (PW2) and G. 3888 PC RUHUSAH (PW3)** did not witness the stabbing incident, but found the deceased unconscious and he narrated to them that it is the appellant who assaulted him. The deceased died on the following day while he was being rushed to Vwawa District Hospital in Mbeya. The cause of death was severe internal bleeding. The appellant was arrested and charged with murder. He denied the charge and after a full trial he was convicted and given death sentence.

Dissatisfied, the appellant seeks to challenge the decision of the trial court. In the memorandum of appeal the appellant has raised four grounds of appeal namely:

(1) *The trial judge erred not to consider the concurrent opinions of the assessors and without assigning reasons.*

(2) *The trial judge erred to accept wholesale the dying declaration of the deceased which was highly likely to spring from mistaken identity given the existing unfavourable horrifying conditions.*

(3) *The two eye witnesses, PW4 and PW5, were like the deceased, equally vunerable to mistaken identification.*

(4) *The defence of alibi was not adequately considered given also the admitted documentary evidence.*

The appellant was represented by Mr. J. Mushokorwa, learned counsel and the respondent Republic was represented by Ms. Catherine Gwaltu, learned Senior State Attorney assisted by Ms. Magreth Mahundi, learned State Attorney.

At the hearing of the appeal, the Court *suo motu* required learned counsel to address it on the predicament of the trial in which assessors were permitted to cross-examine the witnesses. Initially, Mr. Mushokorwa was comfortable that there was nothing wrong with the state of the proceedings

However, when he was referred to look at page 34 of the record of appeal, on reflection he submitted that, the questions raised by the assessor one Daniel Kapungu to the appellant were not geared at seeking clarification as the assessor wholly assumed the role of the prosecutor, which is irregular. On the other hand, Ms. Magreth Mahundi, learned State Attorney was quick to point out that, as the assessor acted as prosecutors the trial is a nullity. She urged the Court to quash the proceedings and order a retrial.

We wish to observe that, during the trial which is a subject of this appeal, the assessors cross examined witnesses for both the prosecution and the defence and in most instances it was followed by re-examination by the prosecution. The irregularity starts at page 14 of the record whereby after PW1 was cross-examined by the learned counsel for the defence, she was cross examined by the three assessors. As for PW2 the cross examination by two assessors appears at page 20 followed by re-examination by one of the prosecuting state attorneys. PW3 was examined by two assessors at page 27 which was followed by re-examination by the prosecuting state attorney. PW4 was cross examined by two assessors at pages 33-34 followed by re-examination by the prosecuting state attorney. At page 38 PW5 was cross examined by the two assessors. A similar trend of the said irregularity also

appears in the defence case whereby the appellant was cross examined by one of the assessors which was followed by re-examination by the learned counsel for the defence.

It is clear that, in the matter under scrutiny, the assessors were allowed to cross-examine 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."

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 **KULWA MAKOMELO AND TWO OTHERS VS REPUBLIC, CRIMINAL APPEAL NO 15 OF 2014** (Unreported), the Court was confronted with a similar situation whereby the trial judge permitted assessors to cross-examine witnesses. The Court stated that, it is clear that, the law frowns upon the practice of allowing assessors to cross-examine witnesses in any trial in terms of section 177 of the Evidence Act (supra). Furthermore the Court digressing on the purpose of cross-examination went further to hold that:

"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 the recent case of **MAPUJI MTOGWASHINGE VS REPUBLIC, CRIMINAL APPEAL NO 162 of 2015 (unreported)** the Court categorically stated that:

"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"

As the role of the assessors in a criminal trial is to assist the trial judge, in terms of section 265 of the Criminal Procedure Act, it is incumbent on the trial judge to properly direct the assessors on the statutory role in assisting the Judge so as not to stray into misdirection or non-directions on vital points for the determination of respective cases resulting into vitiation of such cases. **(SEE MAWEDA MASHAURU MAJENGA @ SIMON VS REPUBLIC, CRIMINAL APPEAL NO, 292 OF 2014 AND MASHAKA JUMA NTALULA VS REPUBLIC, CRIMINAL APPEAL NO.159 OF 2015** (Both unreported).

In the matter at hand, 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 this regard we wish to reiterate what we said in **KULWA MAROMELO'S** case

> *"Where assessors cross-examine witnesses, they necessarily identify themselves with the 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 principles*

of fair trial now entrenched in article 13(6) (a) of the Constitution of the United Republic of Tanzania, 1977".

It is fundamental that, justice should not only be done but seems to be done. This is regardless of the outcome of the trial, considering that the fair administration of justice is the exclusive domain of court which includes assessor who throughout the conduct of trial must be impartial and not biased. **(SEE MASHAKA JUMA NTALULA VS REPUBLIC, CRIMINAL APPEAL NO. 159 OF 2015** Unreported). In this regard the trial which is a subject of this appeal was flawed by incurable irregularity whereby assessors cross examined the witnesses.

We have also noted that, the summing up to assessors was not properly conducted by the trial judge. For example, on visual identification the trial judge at pg. 53 directed the assessors as follows:-

"In making your decisions, lady and gentlemen assessor, you have to consider if the evidence of PW4 and PW5 in respect of the accused at the scene of crime leaves no doubt. They, say, they knew well their chairman, they were with him at the pombe club, and saw him stabbing the accused. He was

arrested in T-shirt and white trouser. There was moonlight hence the proper and correct identification."

The trial judge clearly expressed his own findings of fact on the evidence and had nothing to do with the opinions of assessor but to influence them to agree with him. It was improper for the judge to make his impression known to the assessor because a trial judge should as far as possible desist from disclosing his own views or making remarks or comments which might influence assessors in one way or another in making up their minds about issues being left with them for consideration. **(SEE ALLY JUMA MAWERA VS REPUBLIC (1993) TLR 231.)** Moreover, it is only through a proper summing up that the assessors may give an invaluable opinion to aid the judge in reaching a just decision. **(SEE WASHINGTON S/O ODINDO VS R, (1954) 21 EACA 392).** Where assessors are misdirected on a vital point, the trial judge cannot be said to have been aided by assessors. **(SEE TULUBUZYA BIJURO VS REPUBLIC (1982) TLR 264).**

At pages 55 and 56 of the record assessor opined that the appellant was not guilty. The trial judge who convicted the appellant, apart from narrating the opinions of the assessors, he did not avail reasons as to why

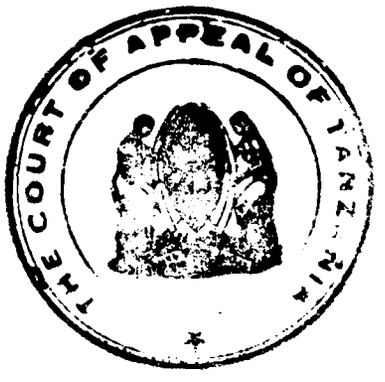
he differed with the assessors. Although a trial judge is not bound by the opinion of the assessors, where a judge differs with the unanimous views of his assessors, it is good practice for the judge to state in his judgment reasons for his disagreement; particularly if the assessors have given grounds for their opinions. **(SEE BALAND SINGH VS R (1954) 21 EACA 209 AND HAMIS MDUSHI VS REPUBLIC, CRIMINAL APPEAL NO 161 OF 2015 (Unreported).**

The trial judge's improper summing up and failure to give reasons as to why he differed with the opinion of assessor also led to a miscarriage of justice on the part of the appellant because it is as if he was tried without the aid of assessor. The irregularity also vitiated the trial.

In view of the aforesaid, the trial was flawed by incurable irregularities occasioned by the cross- examination of witnesses by the assessors; improper summing to the assessors whose opinions were disregarded by the trial judge. As to the way forward, we accordingly exercise our revision power under section 4(3) of the Appellate Jurisdiction Act **[CAP 141 RE, 2002]** and quash all proceedings, conviction and set aside sentence. We however,

and in the interest of justice order expedited retrial of the appellant before another judge with a different set of assessors.

DATED at MBEYA this 8th 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