IN THE COURT OF APPEAL OF TANZANIA
AT TABORA

(CORAM: MBAROUK,J.A.,LUANDA,J.A., And MZIRAY, J.A.)

CRIMINAL APPEAL NO. 176 OF 2015

NORBERT S/O KASHINDI .....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

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

(Mgonya, J)

dated 15th day of December, 2014
in
Criminal Session Case No. 72 of 2013

JUDGMENT OF THE COURT

11th & 19th October, 2016

LUANDA, J.A.:

In the High Court of Tanzania at Tabora, the appellant one NORBERT S/O KASHINDI was charged, convicted and sentenced to death by hanging for unlawfully causing the death of his wife one SCOLASTICA D/O MAKANYE. Aggrieved by the finding of the trial High Court, he has come to this Court on appeal.

In this appeal, Mr. Musa Kassim, learned counsel represented the appellant; whereas the respondent/Republic had the services of Ms Jane Mandago, learned Senior State Attorney.

Mr. Musa has filed a memorandum of appeal consisting of four grounds as follows:-

1. *That, while evidence and testimonies from both the prosecution and defence were taken without administering oaths to the witnesses then the learned trial judge erred in law and fact to convict and sentence the Appellant basing on such evidence.*
2. *That, while the death of the deceased was a result of fighting between the deceased and the Appellant who was drunk by then and provoked by the deceased then the learned trial judge erred in law to find the Appellant guilty of the offence of murder instead of manslaughter as the act leading to the death of the deceased was done under provocation.*
3. *That, the learned trial judge erred in law in her findings leading to conviction and sentencing the Appellant which findings was reached without*

assessing, evaluating and considering the Appellant's defence evidence in the judgment.

4. *That, the learned trial judge erred in law to conduct trial in violation of fundamental principles of fair trial, to wit:*

    (a) *That, learned judge misguided the assessors in summing up upon forming her opinion to the assessors as to prosecution evidence to have proved the guiltiness of the Appellant to the charge.*

    (b) *That, the judgment does not specify the provision of the law under which the appellant is found guilty.*

Mr. Musa informed the Court that he will argue grounds 1 and 4(a) as appearing in the memorandum of appeal only which basically he faulted the trial court to have not followed the procedure of conducting the case in taking evidence of some witnesses and not summing up the case properly to the assessors. Luckily the path in which Mr. Musa intended to take was not opposed by Ms. Mandago. Apart from not opposing, Ms. Mandago

also added one irregularity in that the evidence of PW2 was taken in violation of S. 127(2) of the Evidence Act, Cap. 6 RE, 2002.

Arguing ground number 1, Mr. Musa said the record of appeal shows that Cpl. Magambo (PW3), who testified as the 3rd and last prosecution witness was not sworn before he gave evidence. Likewise, the appellant was also not sworn when he gave his evidence in defence. It is the submission of Mr. Musa that failure to do so before a witness gives his evidence goes contrary to s. 198 (1) of the Criminal Procedure Act, Cap 20 RE 2002 (the CPA). He referred us to our decision in **Emmanuel Charles @ Leonard V R,** Criminal Appeal No. 369 of 2015 (CAT unreported) where the Court said if in a criminal case, evidence is given without oath or affirmation in violation of S. 198(1) of the CPA such testimony amounts to no evidence at all.

Turning to ground 4(a), Mr. Musa submitted that the learned trial judge misguided the assessors when she expressed her opinion when she was summing up the case. The passage the subject of Mr. Musa's complaint which is in page 43 of the record reads:-

" Lady and Gentlemen Assessors, as you have heard their testimony it was totally against their father who is the accused person in this case. However, that is what they saw and that was a fact to them. ***Although they are still under the age of majority that is 14 and 16, they were consistent in their testimony.*** *Something that you have to bear in mind is that, these two children are in a highway. On one side, they are the deceased's children and that they are now missing her and on the other side, the*

accused is their father and that he is also out of their lives at least for the time being. They are suffering on both sides. However, their duty before this court was to testify on the truth of what really happened on that fateful day. ***In those circumstances, the court is of the opinion that they had no any reason to lie over the serous affairs of their parents and theirs too****". [Emphasis added]*

However, Mr. Musa did not tell us the law and section the learned trial judge had breached. Be that as it may, he prayed

that the Court to nullify the entire proceedings and set aside the sentence. Since the appellant has been in prison for more than five years and since there is no evidence to ground conviction for murder as the deceased and the appellant fought before the deceased passed away, he prayed that the appellant to be released from prison.

Ms. Mandago supported the submission made by Mr. Musa that the evidence of PW2 and DW1 were taken in violation of s. 198(1) of the CPA. She said nothing about the learned trial judge to have not properly summed up the case to the assessors. Whatever the position, Ms. Mandago added one irregularity. That is Loyce d/o Norbert who was the 2nd prosecution witness aged 14 years, gave evidence without showing how *voire dire* test was conducted. She said that is against S. 127 (2) of the Evidence Act. She made reference to our case **Mohamed Sainyeye V R,** Criminal Appeal No. 57 of 2010 (unreported) which gives guidelines on how to conduct a voire dire test. In view of the aforestated shortcomings she also prayed that the proceedings be nullified and set aside the sentence but the Court should order a retrial. The

reason for a retrial was that it is not their mistake; it is the trial court mistake.

We start with failure to take oath or affirm a witness before he gives evidence. S. 198(1) of the CPA is very clear that it imposes a duty on the trial court to administer oath or affirm a witness before such witness is being examined. The section provides:-

> *"198(1). Every witness in a criminal cause or matter shall, subject to the provisions of any other written law to the contrary be examined upon oath or affirmation in accordance with the provisions of the Oath and Statutory Declaration Act.*

At pages 24 and 31 of the record of appeal, show thus:-

> *"PW3: A 7626 Coplo Magambo, 44 years, Christian.*
>
> *I work with Police Kasulu as.."*
>
> *"DW1: Norbert Kashindi, 50 years, Christian.*
>
> *I was living etc"*

Because the two were Christians at the time they gave evidence, in terms of s. 4 of the Oath and Statutory Declaration Act, Cap. 34 RE 2002 these witnesses ought to have been sworn before their evidence were taken. Since that was not done, S.198(1) of the CPA was violated. The evidence which is taken in breach of s. 198(1) of the CPA has no evidential value. (See **Mwita Sigora @ Ogora V R,** Criminal Appeal No. 54 of 2008; **Mwami Ngura V R,** Criminal Appeal No. 63 of 2014 (Both unreported).

As regards the learned trial judge to have not properly summed up the case to assessors, we entirely agree with Mr. Musa. The starting point is S.265 of CPA which requires all criminal trials before the High Court to be with the aid of assessors. The section is couched in mandatory terms. The High Court, when hearing criminal cases, where the CPA is applicable, is duly constituted when a judge sit with at least two assessors. The role of assessors is to assist the trial High Court to arrive at a just decision. The assessors assist the High Court in two ways. One, the judge to avail the assessors with adequate opportunity to put

questions to witnesses as permitted by s. 177 of the Evidence Act. Two, the presiding trial judge to sum up the evidence for the prosecution and the defence and shall then require each of the assessor to state his/her opinion as provided under S. 298(1) of the CPA. (See **Augustino Lodaru V R,** Criminal Appeal No. 70 of 2010 – unreported). The words "sum up" means to summarize the evidence on both side with a view to enabling the assessors understand the facts of the case. The section does not permits opinions or views of the presiding judge to form part of the summing up as was done in this case as reproduced above. (See **Kulwa Misangu V R,** Appeal No. 171 of 2015 unreported).

In view of the foregoing therefore, it cannot be said the trial was with the aid of assessors.

Lastly is about *voire dire* test alleged conducted in respect of PW2 who was 14 years and therefore a child of tender age vide s.127(5) of the Evidence Act. Page 19 of the record of appeal shows as follows:

"PW2 Loyce Norbert, 14 years, Christian. Voire dire done and the court is satisfied that the witness is capable of testifying. She was sworn in..."

The above quoted procedure, to ascertain whether a child of tender age is competent to testify leaves much to be desired. Theprocedure was explained in **Mohamed Sainyenye** cited *supra*. In that case the Court said:

"So, before the evidence of a child of tender age is taken, the procedure laid down under S. 127(2) of the Evidence Act must be followed to ascertain whether such witness is competent to testify on oath or affirmation or not on oath or affirmation. In legal parlance the procedure to ascertain whether a child of tender age is competent to testify is known as voire dire. So, the object of conducting a voire dire test is to establish competency of a child whether he is capable of testifying. In case it is found he is not capable of giving evidence either on oath/affirmation, then his evidence should not be taken. ***The finding on these***

points must be recorded on the case record". [Emphasis added].

The Court gave a summary form as to how to ascertain whether a child of tender age is competent to testify. The finding of the learned trial judge that PW2 was capable of testifying without showing how she was capable of doing so is tantamount the *voire dire* test to have not been conducted. In absence of conducting a *voire dire* test, it cannot be said the witness was competent to testify.

In sum, the irregularities shown above vitiate the proceedings. We declare the entire proceedings a nullity. We set aside the sentence. The appellant was charged with murder, a serious offence. Taking into consideration the fact that a human life was lost, we are of the considered opinion that justice demand that a retrial should be ordered.

We order the appellant to be tried afresh before another judge and another set of assessors.

Order accordingly.

DATED at **TABORA** this 17th day of October, 2016.

M. S. MBAROUK
JUSTICE OF APPEAL

B. M. LUANDA
JUSTICE OF APPEAL

R. E. S. MZIRAY
JUSTICE OF APPEAL

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

E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL