IN THE COURT OF APPEAL OF TANZANIA
AT IRINGA

(CORAM: MJASIRI, J.A., JUMA, J.A., And MUGASHA, J.A.)

CRIMINAL APPEAL NO. 153 OF 2012

LEONARD SAVEL @ TWEVE..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT
(Appeal from the decision of the High Court of Tanzania At Iringa)

(Mkuye, J.)

Dated the 25th day of November, 2011
In
Criminal Session Case No. 11 of 2010

JUDGMENT OF THE COURT

5th& 5thAugust, 2016.

MJASIRI, J.A.:

Leonard Savel @ Tweve, who is the appellant, was charged with the offence of murder under section 196 of the Penal Code Cap 16, R.E. 2002. He was convicted as charged and was given the mandatory death sentence.

Being aggrieved by the decision of the High Court he has appealed to this Court.The appellant lodged a five – point memorandum of appeal which is reproduced as under:-

1. *That the honourable trial Judge erred in law and fact in convicting the appellant with murder basing on the evidence of PW6 which was uncorroborated.*

2. *That the honourable trial Judge erred in law and fact by convicting the appellant with murder while the prosecution failed to prove the case against the appellant beyond reasonable doubt.*

3. *That the honourable court erred in law and fact by convicting the appellant with murder without considering the fact that he was an accessory after the fact.*

4. *That the honourable court erred in law by considering the evidence of the investigator who also was the one who took the cautioned statement of the appellant contrary to the requirement of law.*

5. *The honourable court erred in law and in fact by convicting the appellant basing on the evidence adduced by the witnesses of the respondent which was not watertight.*

It was the prosecution case that on March, 2009, the appellant's father, SavelKinyondu @ Tweve disappeared from his home and his

whereabouts were not known. All efforts made by members of his family to look for him were futile. The matter was therefore reported to the Village Executive Officer (VEO) which led to the arrest of the appellant and some other members of his family. While in custody, the appellant admitted to have taken part in burying the deceased in the gulley.On May 28, 2009 he led the police officers to a place where the deceased was buried. The body was exhumed and an autopsy was conducted by Dr. AmonSanga. According to the post-mortem report, the deceased's death was a result of being hit by a blunt object on the head and severe bleeding (Exhibit P1). Subsequent to his arrest, the appellant made a cautioned statement before a police officer D. 1969 D/C Paulo (PW1) and an extra – judicial statement before the Justice of the Peace Mr. James Sikazwe (PW5). In his defence the appellant denied to have committed the offence. The prosecution relied on six (6) witnesses to prove its case.

During the hearing of the appeal the appellant was represented by Mr. Barnabas Nyalusi, learned advocate while the respondent Republic had the services of Mr. Abel Mwandalama, learned Senior State Attorney.

The learned Senior State Attorney had earlier filed a notice of preliminary objection. However he subsequently sought leave of the Court to abandon the same, which was granted by the Court.

Before proceeding on the merits of the appeal, the Court *suomotu*called upon the parties to address the Court *as to whether or not the appellant received a fair trialgiven the fact that part of the trial was conducted without the aid of assessors and the fact that the assessors were allowed to cross examine and re-examine witnesses.*

On the non-inclusion of assessors in part of the trial Mr. Nyalusi, readily conceded that the *trial within a trial* was held prematurely. He made reference to pages 3 and 33 of the record. This resulted in non compliance with the requirements under section 265 of the Criminal Procedure Act, Cap 20, R.E. 2002 (the CPA) which requires that the trial should proceed with the aid of assessors.

On cross-examination and re-examination of witnesses by assessors he contended that this was highly irregular. He relied on section 144 (2) and 146 (2) of the Evidence Act, Cap 6, R.E. 2002 (the Evidence Act). As the assessors assumed a different role, the appellant did not receive a fair

trial. Given the irregularities, the learned advocate for the appellant asked us to nullify the proceedings and to order a retrial.

On the discharge of the assessors before the accused person raised an objection, Mr. Mwandalama submitted that this procedure was highly irregular. He made reference to the case of **SelemaniAbdalla and Two Others v Republic**, Criminal Appeal No. 384 of 2008 CAT (unreported).He submitted that the correct procedure for conducting *a trial within a trial* is when the accused person objects to the admissibility of a document. He stated that part of the trial was conducted without the aid of the assessors contrary to the requirements under section 265 of the CPA.

On the issue of cross examination and re-examination by assessors, he contended that this was contrary to the requirements under the law. He further stated that the kind of questions asked by the assessors were not to seek clarification from the witnesses but to contradict and to bring out incriminating evidence. He made reference to sections 146 – 147 and 177 of the Evidence Act.

We on our part after carefully reviewing the evidence on record and submissions by counsel, are inclined to entirely agree with counsel.

The Court was prompted to raise these pertinent issues**firstly**, because upon a close scrutiny of the record, we observed that twice during the trial the assessors were prematurely discharged, the consequence of which was that a part of the trial was conducted without the presence of the assessors. **Secondly**, assessors were allowed to cross-examine and re-examine the witnesses.

With regard to the absence of assessors, this occurred in the first instance when PW1, the police officer who took down the cautioned statement of the appellant was called to testify. Immediately after being sworn the assessors were promptly discharged. This was done before the *trial within a trial* was conducted. There was a similar occurance when PW5, the Justice of the Peace was sworn. The appropriate time the assessors were supposed to be discharged was after an objection has been raised on the admissibility of a cautioned and/or extrajudicial statement. The law is settled on the procedure to be followed.

By having the assessors discharged prematurely, it means that the trial was conducted without the aid of the assessors which is contrary to the requirements under the law. The assessors were disabled from

effectively aiding the trial Judge. Section 265 of the Criminal Procedure Act (the CPA) provides as follows:-

> *"All trials before the High Court shall be with the aid of the assessors the number of whom shall be two or more as the court thinks fit."*

The assessor's full involvement in the trial is an essential part of the trial process, its omission is fatal, and renders the trial a nullity. See – **AbdallahBazamiye and Others v Republic** [1990] TLR 42.

In the case of **AbdallahBazamiye**(supra) the Court arrived at this decision when it appeared on the record that the trial Judge denied the assessors a chance to put a question to a witness. Therefore assessors should always be present except where there is a dispute as to the admissibility of any evidence. Where such a dispute arises, the practice has been for the trial Court to hold *a trial within a trial* in order to determine the issue of admissibility. It is at this stage that the assessors are excused.It is after determining whether the evidence is admissible or not when the assessors are recalled. Then the witness repeats all the evidence given in *the trial within a trial.*

See – **Jackson @ Mabeyo Francis v Republic**, Criminal Appeal No. 55 of 1994, **SelemaniAbdallah and Two Others v Republic**, Criminal Appeal No. 384 of 2008 and **Ndagizimana and Another v Uganda** [1967] I EA 35.

In the instant case a trial within a trial was hastily conducted by the Court before any objection to have the cautioned and the extra-judicial statement admitted was raised.

In **SelemaniAbdallah @ Two Others v Republic** (supra) this Court elaborately provided a step by step procedure of admitting a cautioned and/or an extra judicial statement and of conducting a trial within a trial. See also **Rashid and Another v Republic** [1969] EA 138.

On the issue of cross-examination by assessors, we are of the considered view that cross-examination by assessors is a serious irregularity which renders the whole proceedings a nullity. Assessors are expected to put questions to the witnesses and not to conduct cross-examination or to re-examine witnesses. This position is clearly indicated under section 177 of the Evidence Act Cap 6 R.E. [2002] (the Evidence Act). It provides as under:-

"In cases tried with assessors the assessors may put any questions to the witness, through or by leave of the Court, ***which court itself might put and which it consider proper.***"

[Emphasis provided].

It is evident from the provisions of section 146 (2) of the Evidence Act, that cross-examination, is the examination of a witness by an adverse party. It is the exclusive right of an adverse party and can only be done by the adverse party and not the assessor.

What constitutes cross-examination is set out under section 155 of the Evidence Act. It provides a follows:-

"When a witness is cross-examined he may in addition to the question herein before referred to, be asked only questions which tends

(a) to test his veracity

(b) to discover who he is and what is his position in life, or

(c) to shake his credibility, by injuring his character, although the answer to such questions might

tend to directly or indirectly to incriminate him, or might expose or tend directly or indirectly to expose him to penalty or forfeiture."

The law is settled, assessors being a part of the court are not supposed to cross-examine. The function of cross-examination is the exclusive domain of the adverse party to a proceeding. See – **MathayoMwalimu and Another v Republic**, Criminal Appeal No. 174 of 2008 and **MashakaAthumani @ Makamba**, Criminal Appeal No. 387 of 2015, CAT (both unreported). The duty of the assessors is to aid the judge in line with section 265 of the CPA and not to cross examine or re-examine. The main objective of cross examination is essentially to contradict. See for instance **AbdallaBazamiye v Republic** [1990] TLR 42.

In **AbdallaBazamiye** (supra) the Court stated that "***it is the discretion of the judge to prevent the asking of questions which are patently irrelevant, biased, perverse or otherwise improper.***"

The assessors being a part of the Court are supposed to be impartial. Therefore being involved in cross-examination and/or re-examination is contrary to the principles of fair trial enshrined under Article 13 (6) (a) of

the Constitution of the United Republic of Tanzania:- See for instance **KulwaMakomelo and Two Others v Republic**, Criminal Appeal No. 15 of 2014 CAT (unreported).

Section 146 of the Evidence Act provides as follows:-

> *"(1) The examination of a witness by the party who calls him is called his examination-in-chief.*
>
> *(2) The examination by the adverse party is called cross-examination.*
>
> *(3) The examination of a witness, subsequent to the cross-examination, by the party who called him is called his re-examination."*

This means that examination in chief and re-examination of witnesses in a trial are the exclusive domain of the prosecuting party while cross-examination is the exclusive domain of the adverse party.

Therefore from the wording of section 177 of the Evidence Act, the role of assessors is to put questions to the witnesses and not to examine or cross-examine or re-examine the witnesses. The questions asked should only be for the purpose of assessors to understand the point in controversy between the parties so as to be able to assist the trial Judge in determining

the case fairly. See – **Washington Odindo v Rex** [1954] 24 EAC 392 and **TulibuzyoBituro v R.** [1982] TLR 264.

In **AbdallahBazamiye** (supra):-

> *"It is not the duty of assessors to cross-examine or re-examine witnesses or the accused. The assessor's duty is to aid the trial judge in accordance with section 265 and to do this they may put questions as provided for under section 177 of the Evidence Act."*

In **MT.1900 SGT Rhoda and Two Others v Republic**, Criminal Appeal No. 226 of 2012 the Court stated that:-

> *"In this case since the assessors abdicated their role and the learned Judge failed to properly direct them, hence losing the sanctity of impartiality, the trial was vitiated."*

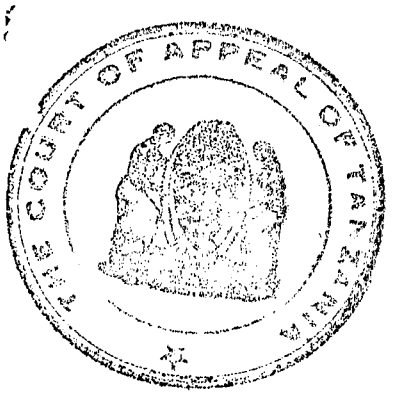
Having considered all the circumstances of the case we are satisfied that the trial was vitiated because of the failure by the High Court to involve the assessors in some parts of the trial and also in letting the assessors cross-examine and re-examine the witnesses.

For the foregoing reasons, we are of the considered view that the procedural irregularities are fatal and render the whole proceedings a nullity.

In the result we hereby invoke our revisional powers under section 4(2) of the Appellate Jurisdiction Act, Cap 141 R.E. 2002. We hereby nullify the proceedings of the High Court, quash the conviction and set aside the sentence. We order a retrial before a different Judge and a different set of assessors.

Order accordingly.

DATED at **IRINGA** this 5th day of August, 2016.



S. MJASIRI
JUSTICE OF APPEAL

I. H. JUMA
JUSTICE OF APPEAL

S. MUGASHA
JUSTICE OF APPEAL

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

B. R. NYAKI
DEPUTY REGISTRAR
COURT OF APPEAL