THE COURT OF APPEAL OF TANZANIA
AT TANGA

(CORAM: MJASIRI, J.A., KAIJAGE, J.A. And MMILLA, J.A)

CRIMINAL APPEAL NO. 388 OF 2015

ANOLD WILLIAM MASHAURI ..... APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Tanga)

(Khamis, J.)

dated 19th day of March, 2015

in

Criminal Appeal No. 10 of 2013

JUDGMENT OF THE COURT

24th June, & 1st July, 2016

KAIJAGE, J.A.:

The appellant was tried by the High Court sitting at Tanga upon the information for murder contrary to section 196 of the Penal Code, Cap 16 R.E. 2002. The information laid alleged that on the 8th September, 2011 at Majani Mapana area within the City and Region of Tanga, the appellant murdered one **JOHN s/o ALOYCE MSUMARI @ ALOYCE MSUMARI.**

Following a full trial, the said trial High Court which sat with three (3) assessors convicted the appellant as charged and sentenced him to death. Aggrieved, the appellant instituted the present appeal.

The appellant lodged a four points memorandum of appeal premised on the following grievances:-

(i) *That the learned trial Judge erred in law and in fact in relying heavily on the evidence of PW5 Dtc/Sgt. SAID ABDALLAH and PW7 Cpl. Juma, whereas the testimonies of the two witnesses suffer material discrepancies between their testimonies in court and statements previously given by them.*

(ii) *That the learned trial Judge erred in law and in fact by misinterpreting the post-mortem examination report, Exh. P1.*

(iii) *That the learned trial judge erred in law and in fact in conclusively finding that it is the appellant who murdered the deceased by running the deceased's own car on his head whereas there is reasonable doubt as to whether the appellant is the very person who killed the deceased.*

(iv) That in the alternative but without prejudice to grounds No. 1,2 and 3 hereof the leaned trial Judge erred in law and in fact in finding that the appellant killed the deceased with malice aforethought.

Before us, the appellant had the services of Mr. Alfred Akaro, learned advocate. The respondent Republic was represented by Ms. ShoseNaiman assisted by Ms. Sabrina Joshi, both learned State Attorneys.

When the appeal was called on for hearing, we desired, in the first place, to have the parties address us on the following fundamental decisive issue affecting the trial High Court's proceedings:

> *Whether in the light of the trial High Court's proceedings, the assessors were allowed to cross-examine the witnesses and what the effect, if any, would be in law.*

Addressing the issue we raised, Mr. Akaro submitted that the appellant's trial was vitiated on account of the fact that the assessors who sat with the trial Judge were allowed to cross-examine the prosecution and defence

witnesses contrary to the letter and spirit of the provisions under section 177 of the Evidence Act, Cap 6 R.E. 2002 (The Evidence Act) as read with section 290 of the Criminal Procedure Act, Cap 20 R.E. 2002 (the CPA). Drawing some instances from the record of proceedings whereby the assessors were allowed to cross-examine the witnesses, Mr. Akaro contended that such procedural lapses were fundamental and occasioned a miscarriage of justice. He thus invited us to nullify the trial court's proceedings and order a retrial.

Mr. Shose, on the other hand, hastened to briefly state that she was at one with Mr. Akaro's submission on the issue we raised. She thus urged us to nullify the trial High Court's proceedings and judgment and consequently, order a retrial.

On our part, we have found ourselves in full agreement with both counsel representing the parties herein. Going by the record of appeal, it is not hard to find, for instance, that at pages 29-30,33-34,40-42,49-50 and at pages 144-145 the assessors were allowed to cross-examine the witnesses for the prosecution. We think the law is clear that in a trial with the aid of

assessors, the trial judge may allow assessors to put questions to witnesses. That is the spirit of section 177 of the Evidence Act which provides:-

> s. *"177. In cases tried with assessors, the assessors may put any questions to the witness, through or by leave of the judge, which the judge himself might put and which he considers proper".*

Whereas in terms of section 177 of the Evidence Act the assessors may put questions to the witnesses, it is certainly not their duty to cross-examine witnesses or the accused person/s. This is consistent with the provisions of section 290 of the CPA which reads:-

> s. *"290.* ***The witnesses called for the prosecution shall be subject to cross-examination by the accused person or his advocate*** *and to re-examination by the advocate or the prosecution."*
>
> [Emphasis is ours.]

Again, the amplification of section 290 of the CPA is found in the Evidence Act which sets out the order in which witnesses are to be examined. In this regard, section 146 of the Evidence Act is relevant and it reads:-

> *s. "146 (1) The examination of a witness by the party who calls him shall be called his examination – in – chief*
>
> *(2)* ***The examination of a witness by the adverse party shall be called his cross-examination.***
>
> *(3) The examination of a witness, subsequent to the cross-examination by the party who called him, shall be called his re-examination".*
>
> [Emphasis is ours].

In this case, it is common ground that instead of the assessors putting questions to the witnesses in line with the provisions of section 177 of the Evidence Act, they are recorded to have indulged in cross-examining them.

When dealing with an identical situation, this Court in **MATHAYO MWALIMU AND ANOTHER VS REPUBLIC,** Criminal Appeal No. 174 of 2008 (unreported), made the following pertinent observation:-

> *"...the function of **cross-examination** is to the exclusive domain of an **adverse party** to a proceeding".*
>
> [Emphasis is ours].

Assessors contemplated under section 265 of the CPA cannot function as parties to any given criminal trial who are legally entitled to cross-examine their adversaries as provided under section 290 of the CPA read together with section 146 (2) of the Evidence Act. The rationale for not allowing assessors to cross-examine was thus stated in **MATHAYO's** Case (supra):-

> *"..... 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 should not therefore assume the function of*

contradicting a witness in the case... they are there to aid the court in a fair dispensation of justice."

The implications of allowing assessors to cross–examine witnesses were stated with sufficient lucidity in **KULWA MAKOMELO AND TWO OTHERS Vs REPUBLIC,** Criminal Appeal No. 15 of 2014 (unreported). In that case, we said:-

"...by allowing assessors to cross-examine witnesses, the court allowed itself to be identified with the interests of the adverse party and, therefore, ceased to be impartial. By being partial, the court breached the principles of fair trial now entrenched in the Constitution. With respect, this breach is incurable under section 388 of the Criminal Procedure Act."

Having in mind the contents of the immediate foregoing extract and for reasons already given, we are constrained to find that allowing cross-examination by assessors in this case undermined the conduct of the trial and that constituted a fundamental procedural irregularity. In consequence

thereof, we invoke our powers of revision under section 4(2) of the AJA to nullify the entire proceedings and the judgment of the trial High Court. We further order a retrial before another judge with a new set of assessors.

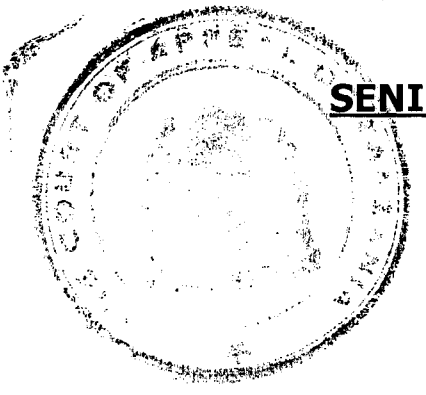
DATED at **TANGA** this 30th day of June, 2016.

S. MJASIRI
JUSTICE OF APPEAL

S.S. KAIJAGE
JUSTICE OF APPEAL

B.M. MMILLA
JUSTICE OF APPEAL

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



P.W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL