

**IN THE COURT OF APPEAL OF TANZANIA
AT TANGA**

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

CRIMINAL APPEAL NO. 389 OF 2015

KEREM BENJAMIN @ JASASU APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

**(Appeal for Conviction and sentence from the Judgment of the
High Court of Tanzania at Tanga)**

(Khamis, J.)

dated 13th day of March, 2015

in

Criminal Appeal No. 3 of 2014

JUDGMENT OF THE COURT

21st & 29th June, 2016

MMILLA, J.A:

The appellant, Kerem Benjamin @ Jasasi, is contesting the judgment of the High Court of Tanzania at Tanga before which he was charged with and convicted of murder contrary to section 196 of the Penal Code Cap. 16 of the Revised Edition, 2002. It was alleged that on 18.01.2012, he murdered one Simon s/o Isaka **(the deceased)**. Upon conviction, he was

conviction, he was sentenced to the mandatory death sentence. Dissatisfied, he has appealed to this Court.

When the appeal came before us for hearing on 20.06.2016, Mr. Obediodom Chanjarika, learned advocate, appeared for the appellant who was also present in Court, while the respondent Republic enjoyed the services of Ms Rebecca Msalangi, learned State Attorney who was assisted by Ms Jenipher Kaaya and Mr. Tulumanywa Majigo, learned State Attorneys.

The brief background facts of the case were that the appellant and the deceased were close friends who were living in Chang'ata village in Handeni District in the Region of Tanga. On 18.01.2012 in the morning, the two friends went to the home of Asia Ally @ Mama Bulu at which the appellant bought local brew which they drank together. In the evening, they left Mama Bulu's place together for their respective homes.

On 19.01.2016 in the morning, news circulated that Simon s/o Isaka was dead. His headless body was recovered in a certain farm within Chang'ata village. The incident was reported to police. Since the appellant was the person last seen with the deceased alive, he was traced,

apprehended and interrogated. The joint efforts of the villagers and the police fruited into the recovery of the missing head which again had no eyes. At a later stage, they recovered one eye, after which the police charged the appellant with murder as it were.

At the commencement of hearing, Mr. Chanjarika abandoned the memorandum of appeal which was filed by the appellant in person in favour of the one which was filed by him on behalf of the former. The said memorandum of appeal raised two grounds; **one** that the trial judge erroneously ignored the appellant's defence of intoxication; and **two** that the trial judge wrongly anchored the appellant's conviction on insufficient evidence.

Before he proceeded to discuss these grounds, Mr. Chanjarika successfully sought the Court's permission to raise one legal point to the effect that the trial High Court wrongly allowed the assessors to cross examine the witnesses instead of asking questions as contemplated by law. He relied on sections 144 up to 146, and section 177 all of the Evidence Act Cap. 6 of the Revised Edition, 2002. He cited pages 22 - 24, 32 - 34, 38 - 40, 47 - 49, 61 - 63, 69 - 71 and 82 - 82. He contended that going by the answers which were given by the respective witnesses who were cross

examined, one cannot avoid the conclusion that the lady and gentleman assessors leaned on the prosecutions side, and that because of that there was no fair trial. Relying on the cases of **Kulwa Makomelo & 2 Others v. Republic**, Criminal Appeal No. 15 of 2014, CAT and **Thomas Pius v. Republic**, Criminal Appeal No 245 of 2012, CAT (both unreported), Mr. Chanjarika urged the Court to find and hold that the proceedings were a nullity. He requested the Court to invoke the powers it has under section 4 (2) of the Appellate Jurisdiction Act Cap. 141 of the Revised Edition, 2002 (the AJA) to quash those proceedings, set aside the sentence which was imposed and order a retrial.

On her part, Ms. Msalangi was categorical that there is nothing in the court record to show that the assessors cross - examined the witnesses, and that at any rate the answers which were provided by the witnesses did not suggest prejudice to any of the parties in the case so as to attract the consequences suggested by the learned defence counsel. If anything, she went on to submit, the irregularity was minor, thus curable under section 388 of the CPA. She pressed the Court to fault the submission of Mr. Chanjarika that there was unfair trial in this case.

There is no gainsaying that in terms of section 265 of the CPA, all criminal trials before the High Court are with the aid of assessors, the number of which is two or more as the court thinks fit. In the course of discharging their duty to assist the judge, the assessors are mandated to put questions to the witnesses as contemplated by section 177 of the Evidence Act, but not allowed to cross – examine them. Section 177 of the Evidence Act provides that:-

"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."

On the other hand, section 290 of the CPA stipulates who may be cross examined and by whom. That section states that:-

*"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 for the prosecution."* [Emphasis provided].

The combined effect of the above quoted sections is that there is no room for the assessors to cross –examine - See also the case of **Mathayo Mwalimu & Another v. Republic** (supra) in which the Court said that:-

*"So, from the above provisions of the Act there is no room for assessors to cross-examine witnesses. Under the Evidence Act assessors can only ask questions . . . The reason for the above exposition of the law is not farfetched. The exposition is based on sound reason. **The purpose of cross examination is essentially to contradict. That is why it is a useful principle of law for a party not to cross-examine a witness if he/she cannot contradict. By the nature of their function, assessors in a criminal trial are not there to contradict. They are there to aid the court in a fair dispensation of justice. Assessors should not, therefore, assume the function of contradicting a witness in a case. They should only ask him/her questions.**"*

[Emphasis added].

Also worth noting in this context is section 155 of the Evidence which explicates the essence of cross – examination. That section provides that:-

"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."

The fact that this provision states that cross – examination is intended to test the witness's veracity and/or shaking his/her credibility justifies why the assessors are not allowed to cross examine because they being part of the court, are supposed to be impartial – See the case of **Kulwa Makomelo & 2 Others v. Republic (supra)**. In that case the Court stated that:-

". . .the assessors are part of the court; and the court is supposed to be impartial. Since under section 146 (2) of the Evidence Act cross

examination is an exclusive domain of an adverse party, by allowing the 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."

After carefully going through the proceedings of the trial court in our present case, we think Mr. Chanjarika cannot be faulted in his complaint that the trial court allowed the assessors to cross examine the witnesses. We will demonstrate.

We will begin with what is reflected at page 23 of the court record at which, when he was cross examined by the first lady assessor Zahira Kakere Juma, PW1 stated that:-

*"...Nobody asked the accused to identify the deceased's body. He was immediately arrested and roped. The villagers were about to strangle the accused to death. **I witnessed the deceased's head. I heard the policemen ask the accused on (the) where about***

of the eyes. He said they are at the shamba. He returned with one eye. The other eye could not be found. When Jasusi was persuaded to put on his washed clothes, the clothes were wet. The accused's (sic) had put on a jeans trousers from where I saw blood stains..."

Again, at page 24 the second lady assessor, Mariam Bubelwa cross examined PW1 which resulted into the response reflected in the following answers:-

"...I don't know why the accused removed the deceased's eyes.

When we questioned the accused about blood stains on his trousers, he was evasion and suspicious."

Similarly, at page 33, when PW2 was cross examined by the second lady assessor, Ms. Mariam Mbelwa, that witness stated as follows:-

"...the accused...introduced me to the stranger Mahezaule. The trio were discussing various topical issues relevant to themselves. It is about one km from my village to Abraham's place. The accused came alone from Abraham's place. The accused was dressed in a brown

*short sleeved t shirt. He was not dressed in jeans. **I have not seen the stranger Mahezaule ever since the deceased died...***"

Also, at page 34, in responding to questions from a gentleman assessor Mr. Said Kihiga, PW2 is recorded to have said:-

*"I don't know the circumstances in which the accused was arrested [.] I only reported to the village executive officer of what I know about the deceased and the accused. **I did not tell [sic: tell] the executive officer about the stranger Mahezaule because the stranger was unknown.** I only told the executive officer to find the accused because he was a friend to the deceased from my residence; you could not see the deceased's body from where it was left on the way. I did not see the accused kill the deceased."*

Similarly, when cross examined by the first lady assessor, Ms. Zahira Kakere Juma at page 39 PW3 stated that:-

"I witnessed the youngmen (sic) producing a bush knife he had used to slaughter the deceased and handed (sic) it over to the police. The police collected the bush knife. The youngmen

told the police that he had killed the deceased alone with the assistance of any other person."

Further, at page 40 of the Court Record, when cross examined by the second lady assessor, Mariam Mbelwa, PW3's response was that:-

*"I know the three women I met when I saw the deceased body. The elder one is MARIAM and her two daughters. **The youngmen confessed killing to the policemen not to the militia men. The bush knife produced by the youngmen to the police had no blood.**"*

Again, at page 47, when cross examined by the first lady assessor, Ms. Zahira K. Juma, PW4 is recorded to have stated that:-

*"When the deceased was brought to the scene by the militia men he did not say that he killed the deceased. When I asked the accused the time when he departed from the deceased, he said it was 9.00 p.m. **When the police came, the accused confessed to murder in my presence. The accused did not say why he slaughtered the deceased. The accused did not tell us the reason for detaching the head from the body but he told us that he***

removed the eyes so that the police could not detect his responsibility for the murder."

On the next page, that is page 48, when cross examination by the second lady assessor, PW4's response was that:-

*"...The well where the accused took bath is used by the villagers for fetching clear water used in their domestic uses. It is about 17-20 metres from the dead body to where we found the deceased's head we don't know where the other eye was. **The accused told us that he had removed the eyes by the use of a bush knife. I saw the bush knife. The bush knife had no blood because the accused had washed it with water at the well.**"*

Finally, at page 93 to 94 of the record, the appellant was similarly cross examined by the first lady assessor Ms. Zahira K. Juma. His response was that:-

*"I am charged the murder of Simon Isaka in this court. **I denied the charge because the charge said "intentionally" killing the deceased whereas I did not intend to kill him. After cutting the deceased that night I left not knowing where I was***

going discovered at late night that day that I was at home.

Don't remember who opened the door for me at home. When I woke up I saw my wife at home. I woke up at around 3.45 a.m. and found my wife. I did not tell my wife anything on what had happened."

These are but a few examples showing that the assessors wrongly cross examined the witnesses, which no doubt is a fatal irregularity which cannot be cured by section 388 of the CPA as suggested by Ms Msalangi. The consequences of the irregularity above found were re-stated in the case of **Thomas Pius (supra)** in which the Court said that:-

" . . . where it is obvious that the assessors cross-examined witnesses, it is apparent that the accused person was not accorded a fair trial because the irregularity goes against one of the principles of natural justice namely the rule against bias, and it vitiates the entire proceedings – See the case of the Nathan Baguma @ Rushejela v. Republic, Criminal Appeal No. 166 of 2015, CAT (unreported) in which upon a finding that such an irregularity was established, the proceedings were declared a nullity and a retrial was ordered."[Emphasis provided].

In view of our finding that the act of allowing the assessors to cross – examine the witnesses was fatal; we are constrained to invoke the powers obtaining under section 4 (2) of the AJA, for which we quashed the proceedings of the trial High Court and set aside the sentence that was imposed. Consequently, we order a retrial before another judge sitting with a different set of assessors.

Order accordingly.

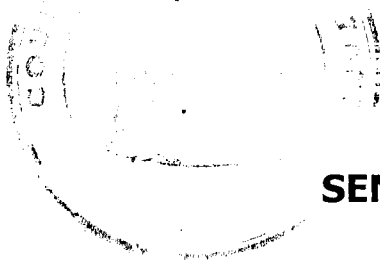
DATED at **TANGA** this 28th day of June, 2016.

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