IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: RUTAKANGWA, J.A., LUANDA, J.A., And MMILLA, J.A.)

CRIMINAL APPEAL NO. 245 OF 2012

THOMAS PIUS..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Dar es Salaam)

(Mwaikugile, J.)

Dated the 11th day of July, 2012
in
HC Criminal Session Case No. 24 of 2008

JUDGMENT OF THE COURT

19th April & 5th May, 2016

MMILLA, J. A.:

The appellant, Thomas Pius, is appealing against the judgment of the High Court of Tanzania at Dar es Salaam. Before that court 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 or about 6.7.2006 he murdered one Mary d/o Shelumbati (the deceased). Upon

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 19.4.2016, Mr. Protas Kato Zake, learned advocate, appeared for the appellant who was also present in Court, while the respondent Republic enjoyed the services of Ms Christine Joas, learned Senior State Attorney, assisted by Ms Anna Chimpaya, learned State Attorney.

Two sets of memoranda were filed; the first set was filed on 7.8.2015 by the appellant in person, while the second set was filed on 6.11.2015 by Mr. Sinare Zaharan, learned advocate, on behalf of the appellant. At the commencement of hearing, Mr. Zake abandoned the grounds which were filed by the appellant and elected to argue the appeal basing on the memorandum which was filed by Mr. Zaharan.

For reasons which will unfold in the course of making this judgment, we instructed the parties to address us on two fronts; the **first** is the complaint captured from the first ground of appeal alleging that the trial court wrongly admitted and relied upon the documentary evidence constituted in exhibits P1, P2, P3 and P4 (the post mortem report, the

cautioned statement, the extra judicial statement and the sketch map respectively); and the **second** is a ground raised by the Court ***suo motto*** for which we asked the counsel for the parties to address us on whether or not it was proper for the trial court to allow the assessors to cross examine the witnesses instead of allowing them to put questions to them.

The submission of Mr. Zake on these two points was brief, powerful and focused. Regarding the first ground, he contended that at the time those documents were tendered in court the appellant was not asked if he had any objections, also that they were not read over in court as it ought to have been. He maintained that the omission to read them was a fatal irregularity which occasioned miscarriage of justice.

On the second ground, Mr. Zake submitted that the trial court offended the provisions of section 177 of the Evidence Act Cap. 6 of the Revised Edition, 2002 when it allowed the assessors to cross examine the witnesses. He clarified that the assessors' obligation in that regard is limited to put questions to the witnesses. Mr. Zake submitted therefore the proceedings were nullity. He urged the Court to quash them, set aside the

sentence and order a retrial before a different judge seized of jurisdiction sitting with a different set of assessors.

On the other hand, Ms Joas associated herself with the submission by Mr. Zake, including the proposed consequences and the way forward.

On our part, we absolutely share the concern of counsel for the parties and the proposal for the way forward for reasons we are about to assign. We will begin with the ground challenging the way the complained of documentary evidence was admitted and the faulted reliance on them.

We noted that the complained documents were tendered and admitted in evidence during preliminary hearing. This is reflected at page 3 of the court record. The record shows that the subject documents were tendered in court and admitted collectively after the appellant's then advocate, one Mr. Mkali informed the trial court that he had no objection.

In our view, the fact that the appellant's advocate was consulted on whether or not they had any objection in the tendering of those documents shows that the rule of practice that whenever it is intended to introduce a document in evidence it should first of all be cleared for admission, was observed. See **Charles Vitalis Ndege Matutu & 2 Others v. Republic,**

Criminal Appeal No. 257 of 2014, CAT (unreported). In that case the Court stated that:-

> *"It is trite law that whenever it is intended to introduce a document in evidence it should first of all be cleared for admission. This is normally done by ascertaining from the accused person whether he/she has any objection. The failure to do so will normally result in the document being expunged from the record."*

On the other hand however, those documents were not read in court because there is nothing on record to suggest otherwise. As such, the appellant was denied the opportunity of knowing the contents of those documents. This violated the rule of practice that any documents tendered and admitted in court as evidence must be read to afford opportunity to the appellant, counsel for the parties and the assessors to hear what they were all about. Omission to read them is a fatal irregularity – See the case of **Sumni Amma Awenda v. Republic**, Criminal Appeal No. 393 of 2013, CAT (unreported)in which the Court said that:-

> *"We need to point out that both, the cautioned and extra judicial statements had a lot of details and immensely influenced the decision*

of the trial court . . . to have not read those statements in court deprived the parties, and the assessors in particular, the opportunity of appreciating the evidence tendered in court. Given such a situation, it is obvious that this omission too constituted a serious error amounting to miscarriage of justice and constituted a mistrial."

Mistrial entails court hearing that is not carried out properly and according to the process of the law. Actually, it is one and the same thing with unfair trial.

As for the fundamentals of mistrial and/or fair trial, we resort to the case of **Charles Ng'wandu @ Mpikachai Mabala & Another v. Republic,** Criminal Appeal No. 289 of 2014, CAT (unreported) in which, quoting the decision in **Ngassa Kapuli @ Sengerema v. Republic,** Criminal appeal No.160 "B" of 2014 CAT (unreported), the Court summarized that:-

"The right to a fair trial is an essential component to the rule of law. This right is universally recognized in various international instruments, such as Article 10 of the Universal Declaration of Human Rights and

Articles 14 and 16 of the International Covenant on Civil And Political Rights and Articles 3,7, and 26 of the African Charter on Human and Peoples Rights. The aim of the right is to ensure proper administration of justice. As a minimum standard the right to a fair trial includes:-

1. *The right to be heard by competent, independent and impartial tribunal.*
2. *The right to public hearing.*
3. *The right to be heard within a reasonable time*
4. *The right to counsel.*
5. *The right to interpretation.*

These rights are sometimes broadly referred to as natural justice, or fair procedure or procedural due process."

We carefully read the judgment of the High Court in our present case. We found that the trial court was hugely influenced by the cautioned and

extra judicial statements (exhibits P2 and P3), so also the post mortem report (exhibit P1). On pages 92, 93 over to page 94, the trial court said in its judgment that:-

> *"I have given serious thought to the driving force that led the accused person to terminate the life of the deceased. It is on evidence that the accused was influenced by his mother who told him that his maternal auntie was the cause of all the problems his family was facing. It is his belief in witchcraft that made him lose sense of control and reasoning to an extent that he resorted to an irrational decision of killing the deceased, a fact which he does not deny.*
>
> ***He admits that he did kill the deceased and that is clearly stated in both his cautioned and Extra Judicial statements which during preliminary hearing were tendered and admitted as prosecution exhibits.*** *There was no objection raised by the defence when the prosecution sought leave of the court to have the said statements admitted as prosecution evidence. The learned defence counsel had every opportunity to raise objection against the admission of the said documents during preliminary*

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again, after traversing the proceedings of the trial court, we agree that the counsel for the parties have cause to complain on this point too.

We begin with page 10 at which Muwanga Isaya, who was one of the three assessors who participated in the trial ostensibly cross examined PW1 John Milingo basing on the answers which were given by the witness. The answers were as follows:-

> *"The deceased was living with my old brother (sic) Moses Milingo, when I saw the accused in the morning of 6/7/2006 he was restless. I never asked him how he had injured himself. The accused was in good terms with the deceased. . . ."*

The other assessor who also cross examined PW1 was Christopher Shemdolwa. The answers given by PW1 which suggest that the witness was cross examined were as follows:-

> *"Moses Milingo did not tell me who killed the deceased . . . I do not know [if] the accused is linked with the death of Mary Shelumbati."*

As already pointed out, these answers are suggestive that these assessors cross examined PW1.

Again, at page 12 the lone answer gotten from PW2 Philip Chudu suggest that the third assessor one Amina Zombe cross examined him. The answer was as follows:-

"I do not know who hit the deceased with the piece of wood."

A similar impression is found at page 16 and 17 of the record where answers given by PW3 No. D. 6189 D/Cpl. Ismail suggest that the assessors cross examined him. The relevant part at page 16 is as follows:-

"XXD by Mr. Muwanga (1st Assessor)

Id "1" is a bed stand but not a bed stand of the deceased bed. The said bed stand had not been used. I do not know where the accused got Id "1". The accused alone was involved in the killing of the deceased. The accused did not tell me the reason for killing the deceased. I do not know if the accused was in order when he admitted to have committed the offence. At the scene [of crime] I found the dead body inside the house of the deceased. The offence was committed inside the house of the deceased and was thrown in the terraces of sweet potatoes."

hearing. He did not make use of that golden opportunity. I am strongly of the view that he cannot be heard at this point to challenge that which has been formally admitted and marked as an exhibit. To raise such a challenge at this stage is nothing but an afterthought which cannot be entertained.

In addition, there is evidence to the effect that the accused assaulted the deceased who sustained head injury that led to severe bleeding which eventually caused the death of the deceased. ***That was established by the medical examination whose report was not challenged by the defence. It was admitted and marked as Exh. P. 1."*** [Emphasis provided].

Since exhibits P1, P2 and P3 in the instant case were heavily relied upon by the trial court in convicting the appellant, and because they were not read to the accused person, we have no flicker of doubt that a miscarriage of justice was occasioned, therefore that the complaint on admissibility and reliability on those documents has merit.

We now come to the next ground concerning the complaint that the assessors were wrongly allowed to cross examine the witnesses. Once

In answer to what was asked of him by the second assessor Amina Zombe, PW3 is recorded to have replied at page 17 that *"I never saw "Ndonya" at the scene."*

Yet again, PW3's answers when responding to what was demanded of him by the third assessor, Christopher Shemdolwa were as follows:-

> *"I and D/Cpl. Charles investigated this case. I first visited the scene of crime. PW1 told me that the accused was responsible for the death of the deceased. PW1 was the accused running away from the scene of crime (sic)."*

A similar situation is seen when we considered the answers which were given by the appellant in response to what was demanded of him by the assessors as shown at page 23. First to be considered are the answers in response to the demands of the first assessor Mr. Muwanga Isaya. It was as follows:-

> *"When I did the killing, I was out of my senses, if I found the deceases still alive the following morning I would not have assaulted her farther. I was being told by my mother that the deceased was a witch. My mother is still alive up to now. In my family seven children*

were born, only four are still alive. This is the first time I am killing a witch. If I get another one, I will kill him/her. I hate wizards."

So also in response to the second assessor Amina Zombe for which the deceased said:-

"I have never had any mental disease at any time. I never narrated with the deceased (sic)."

All the above quotations convey the strong message that those answers were an outcome of cross examination. This was wrong because in terms of section 177 of the Evidence Act, the assessors mandate is only to put questions to witnesses. That section provided 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."

The rationale for this was best expressed in the case of **Mathayo Mwalimu & Another v. Republic**, Criminal Appeal No. 147 of 2008, CAT (unreported) in which the Court emphasized 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."

In circumstances such as these 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 – See also the cases of **Kabula Luhende v. Republic,** Criminal Appeal No. 281 of 2014, CAT and **Kulwa Makomelo & 2 Others v. Republic,** Criminal Appeal No. 15 of 2014, CAT (both unreported).

Since we have said the irregularity in the present case is fatal, we are constrained to quash the proceedings and set aside the sentence that was imposed. This brings us to issue whether or not to order a retrial as opined by both counsel for the parties.

As a general rule, a retrial will be ordered only when the original trial was illegal or defective, or where the interests of justice require it. It will not be ordered where it is likely to cause an injustice to the accused person, or where the conviction is set aside on the ground of insufficiency of evidence, or for the purpose of enabling the prosecution to fill gaps in its evidence at the first trial; but always keeping in mind that each case must depend on its particular set of facts and circumstances – See **Fatehali Manji v. Republic** [1966] E.A. 343

In the present case, the appellant was charged with murder which is a serious offence and attracts a death sentence. Since the nullification of the proceedings was occasioned by fundamental defects in the trial, we are firm that public interest demands us to, and we hereby order a retrial before a different judge seized of the jurisdiction to try such case who will sit with a different set of assessors.

Order accordingly.

DATED at **DAR ES SALAAM** this 28th day of April, 2016.

E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

B. M. LUANDA
JUSTICE OF APPEAL

B. M. MMILLA
JUSTICE OF APPEAL

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

Z. A. MARUMA
DEPUTY REGISTRAR
COURT OF APPEAL