IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: MUSSA, J.A., MZIRAY, J.A., And NDIKA, J.A.)

CRIMINAL APPEAL NO. 134 OF 2015

KIJA LUHANDIKA .....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the conviction of the High Court of Tanzania at Mwanza)

(De-Mello, J.)

dated the 16th day of February, 2015
in
Criminal Sessions Case No. 23 of 2010

JUDGMENT OF THE COURT

23rd & 26th May, 2017

MZIRAY, J.A.:

KIJA LUHANDIKA (henceforth the appellant) was charged with and convicted of the offence of murder contrary to section 196 of the Penal Code (Cap 16 R.E. - 2002) by the High Court of Tanzania (De-Mello, J.) sitting at Geita. He was sentenced to suffer death by hanging.

It was alleged before the trial court that the appellant murdered one NYABUKE LUDONA, on the 9th day of November, 2008, at Kasamwa village, within Geita District at about 02:00Hrs. Aggrieved by the said conviction and sentence, he preferred this appeal.

Apart from his Memorandum of Appeal containing five grounds of appeal, which he filed on 4th October, 2013, the appellant's counsel in addition on 3rd April, 2015 filed a Supplementary Memorandum of Appeal containing four grounds of appeal. At the commencement of the hearing, Mr. Sylveri Byabusha after consulting the appellant and with the leave of the Court urged only the four grounds of appeal in the Supplementary Memorandum of Appeal which are: -

1. *The court assessors were allowed to cross-examine prosecution witnesses to the prejudice of the appellant.*
2. *The learned trial judge failed to give reasons in her judgment why she differed with the unanimous opinions of the court assessors.*
3. *The appellant's evidence was taken without oath contrary to what was intimated by his defence counsel which renders his testimony valueless.*

4. The Prosecution case was not proved beyond reasonable doubt since no inculpatory fact pointed to the guilt of the appellant."

In this appeal Mr. Sylveri Byabusha, learned counsel represented the appellant; whereas the respondent/Republic had the services of Mr. Pascal Marungu, learned Senior State Attorney.

Submitting on the first ground of appeal, the learned counsel pointed out that the trial was unprocedural on account of the fact that the assessors at page 5, 6, 14 and 15 of the record of appeal were allowed to cross-examine the witnesses contrary to the provisions of section 177 of the Evidence Act, Chapter 6 of the laws, which only mandates them to put questions to witnesses. On this point, the learned counsel referred us to the unreported Criminal Appeal No. 354 of 2015 – **Chacha Ghati Mwita and Another V. Republic.**

On the second ground, the learned counsel submitted that the trial judge differed with the unanimous opinions of the court assessors but did not give reasons to that effect as required by the law. He cited the case of **Abdallah Bazamiye V. Republic**, Criminal appeal No. 26 of 1990 [unreported] as authority.

Addressing the third ground of appeal, the learned counsel submitted that the appellant is an atheist in belief and therefore he was to give an affirmed statement but to the contrary his evidence was taken without affirmation. The learned counsel told this Court that the effect of giving evidence without affirmation rendered the appellant's evidence valueless and it is as if he did not give evidence at all.

In the fourth ground of appeal, the appellant's learned Counsel argued that the Prosecution case was purely based on circumstantial evidence but on analyzing the testimonies of the four Prosecution witnesses who testified before the trial court, there was no inculpatory facts to link the appellant with the murder of the deceased. Most of the evidence was hearsay and based on assumptions, he submitted, which according to him is insufficient to ground a conviction.

On the basis of what he submitted in the four grounds of appeal, he prayed for the appeal be allowed and the appellant be released from gaol.

On his part, Mr. Pascal Marungu, learned Senior State Attorney did not object the appeal. He was in agreement with what was submitted by Mr. Byabusha, learned counsel. He agreed that the case at hand was

based on weak circumstantial evidence and that the evidence did not prove the offence beyond reasonable doubt. He pointed out that the evidence of PW2 Method Manyakenda which is crucial to the Prosecution case is hearsay. This witness just heard the daughter of the deceased, Grace Makoye saying that her mother was killed by a certain man. It's unfortunate that Grace Makoye was not called in court to testify and worse enough, there is no explanation as to why she was not called to testify. Under the circumstances, the learned Senior State Attorney was of the view that the Prosecution evidence does not point to the guilt of the appellant and that the whole case was built on assumptions.

We have given anxious consideration to the submissions made by both parties. We hasten to say that we are entirely in agreement with what they have said. We think that ground 1 and 4 are sufficient to dispose of this appeal. Having perused the record thoroughly, there is no dispute and it is clear that the trial court at page 5,6,14 and 15 of the record allowed the court assessors to cross-examine the witnesses, which is unprocedural. It is contrary to the provisions of section 177 of the Evidence Act, Chapter 6 of the laws, which only mandates them to put questions to witnesses.

The provision of section 177 of the Act reads:

> *"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."*

On the basis of that provision of the law, it is obvious that assessors and Judges are not allowed to cross-examine witnesses, as that is the function of an adverse party to a proceedings. It is also clear that the duty of assessors and the Judge is to put questions to witnesses for clarification and not to cross-examine as the aim of cross-examination is basically to contradict, weaken or cast doubt upon the accuracy of the evidence given by the witness in chief. (See for instance the cases of **KULWA MAKOMELO & TWO OTHERS v R**, Criminal Appeal No. 15 of 2014, **MATHAYO MWALIMU AND ANOTHER V R**, Criminal Appeal No. 174 of 2008, **GODLOVE AZAEL @ MBISE V R**, Criminal Appeal No. 312 of 2007 **MAPUJI MTOGWASHINGE VR.,** Criminal Appeal No. 162 of 2015 (All unreported) and **ABDALLAH BAZAMIYE AND**

OTHERS V R, [1990] TLR 42). In the latter case this Court among other things stated: -

> *"It is not the duty of assessors to cross-examine or re-examine witnesses or the accused. The assessors' duty is to aid the trial judge in accordance with section 265, and to do this they may put their questions as provided for under section 177 of the Evidence Act, 1967. Then they have to express their non-binding opinions under section 298 of the Criminal Procedure Act, 1985. We might mention here that, in practice, when they put their questions under section 177 of the Evidence Act 1967 other than through the judge, they do so directly, the leave of the judge being implicit in the judge not stopping them from putting their questions. That is, the discretion remains with the judge to prevent the asking of questions which are, for example patently irrelevant, biased, perverse, or otherwise improper."*

Once it is shown that the assessors have cross-examined witnesses it is taken that the accused have not been accorded a fair trial, in particular, it offends one of the principles of administration of justice namely the rule against bias which goes contrary to Article 13(6)(a) of the Constitution of the United Republic of Tanzania. That irregularity to us is incurably defective. (See **KULWA MAKOMELO** *(supra)*, **KABULA**

LUHENDE V R, Criminal Appeal No. 281 of 2014; **MAWEDA MASHAURI MAJENGA @ SIMON V R**, Criminal Appeal No. 29 of 2004 (CAT- all unreported).

Since the irregularity is incurably defective as pointed out, then, this Court in exercise of its revisionary powers conferred to it under S.4 (2) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2002 would have declared the High Court proceedings a nullity and proceeded to quash the conviction and set aside the sentence meted out and order a retrial. But, we have seriously considered the arguments by the learned counsel for the appellant which are readily conceded by the learned Senior State Attorney, and rightly so, in our view, that the evidence on record falls short to sustain any possible conviction of the appellant. As correctly submitted by the learned Counsel, the Prosecution evidence is wanting. PW2 was informed by one Grace Makoye, the deceased's daughter that the appellant was the one who killed the deceased but this Grace Makoye whom we think was a key witness was not called in court to testify. There is no explanation as to why she was not called to testify. On the other hand, in their testimonies PW1, the Investigating Officer, PW3, the Police Officer who drew the sketch plan of the scene and PW4,

the doctor who conducted the post mortem examination of the deceased body, did not at all implicate the appellant with the killing of the deceased.

That said therefore, an order for retrial in this case will not serve the interests of justice. In the upshot, we are satisfied that this appeal has merit. We allow the appeal, quash the conviction and set aside the sentence. We order forthwith the release of the appellant, unless lawfully held.

It's accordingly ordered.

DATED at **MWANZA** this 25th day of May, 2017.

K.M. MUSSA
JUSTICE OF APPEAL

R.E.S. MZIRAY
JUSTICE OF APPEAL

G.A.M. NDIKA
JUSTICE OF APPEAL

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

P.W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL