IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

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

CRIMINAL APPEAL NO. 30 OF 2015

KHALID LANGSON ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High of Tanzania

at Mbeya)

(Ngwala, J.)

dated the 12th day of December 2014

in

Criminal Session Case NO. 18 of 2012

JUDGMENT OF THE COURT

29th September & October, 2017

MWANGESI, J.A.:

In the High Court of Tanzania at Mbeya, the appellant herein was arraigned for murder contrary to the provision of section 196 of the Penal Code, Cap 16 RE 2002. The contents of the information that was put to the appellant on the 20th day of March 2013, was to the effect that, on the 29th day of November 2011, at Shoga village within the district of Chunya in

Mbeya Region, the appellant did murder one Atilio Kalibuka hereinafter referred to as the deceased. As the charge was denied by the appellant, the case had to go to a full trial whereby, the Republic paraded seven witnesses to establish the guilt of the appellant, whereas, on his part, the appellant called one witness to supplement his defense evidence.

At the end of the day, the learned Judge who presided over the case being assisted by assessors, were satisfied beyond reasonable doubt that, the charge against the appellant had been established to the hilt. The appellant was therefore convicted to the charged offence, and sentenced to the statutory sentence of suffering death by hanging. Aggrieved by the conviction and sentence, the appellant has appealed to this Court armed with about seven grounds of appeal which were lodged in Court on the 13th March 2015.

On the 29th September 2017, when the appeal was called on for hearing, Mr. Victor Mkumbe learned counsel being assisted by Mr. James Kyando learned counsel, did enter appearance for the appellant whereas, Mr. Francis Rogers learned State Attorney, being assisted by Ms Mwajabu Tengeneza learned Sate Attorney, did appear to defend the respondent Republic. Mr. Mkumbe did rise to inform the Court that, upon being

assigned this dock brief to appear and defend the appellant, and upon going through the grounds of appeal which were prepared by the appellant, he did file a supplementary memorandum of appeal wherein, the grounds of appeal by the appellant have been condensed to four grounds only, an arrangement which has been acceded to by the appellant. In that regard therefore, they did abandon the previous grounds of appeal that had ~~been~~ were prepared by the appellant and remained with the newly prepared ones which read as hereunder:

1. *The Honourable trial Judge erred to allow the gentle assessors to conduct cross-examination to the witnesses as reflected at pages 19, 26, 38, 43, 44, 50, 53 65 and 68.*
2. *The Honourable trial Judge having appreciated that, there was no direct evidence to show that the accused was in the commission of murder at page 84, seriously erred to convict the accused basing on the circumstantial evidence particularly giving weight on the alleged "sululu" pick exe which for undisclosed reasons was not tendered in Court though PW5 at page 44, admitted that the police took the same.*

3. *The Honourable trial Judge erred to hold that, the accused disappeared after the death of the deceased at page 85, while there was no concrete proof that, the accused had at any material time stayed at Jumanne Machimu as was alleged by PW3 at page 22 and PW4 at page 35. The trial Judge ought not to have trusted the allegations by the two witnesses in the absence of Jumanne's testimony, the omission of which was enough for the Court to draw an adverse inference in view of section 122 of the Evidence Act, Cap 6 RE 2002.*
4. *The Honourable Judge erred to accord no weight to the defense of alibi as raised by the accused, on the basis that, the accused person failed to furnish any documentary evidence to support his defense of alibi at page 83.*

As we were of the view that, the first ground of appeal was the most intriguing one as it could be reflected from the records of the Court, we did require the learned counsel for the appellant to address us on that ground alone. In amplification to that ground of appeal, the learned counsel for the appellant did submit before us that, according to the records of the trial Court, it is disclosed that during the trial of the case leading to the appeal

at hand, the assessors who sat with the learned trial Judge to try the case, were allowed to cross-examine both the prosecution witnesses as well as the defense witnesses. The view of the learned counsel for the appellant was that, such practice did contravene the cherished practice in Criminal trials as stipulated under the provision of section 146 of the Evidence Act, Cap 6 RE 2002 (the Evidence Act.)

Referring us to our earlier decision in the case of **Chrisantus Msingi Vs Republic,** Criminal Appeal No. 97 of 2015 (unreported), the learned counsel for the appellant has urged us to find the proceedings of the trial Court null and void and as a result, we be pleased to nullify them and direct for retrial in compliance with the dictates of law. Such proposition by the learned counsel for the appellant was seconded by Mr. Francis Rogers, learned State Attorney, who told the Court that, they have also noted the said anomaly of which, the only proper remedy available, is an order by this Court for retrial with strict compliance with the requirement of law.

On our part, we are in full agreement with the learned counsel for both sides that, throughout the trial of this case, the assessors were permitted by the learned trial Judge to actively cross-examine the witnesses of both sides that is, seven witnesses for the prosecution and

two witnesses for the defense, contrary to what the law stipulates that, they had to only ask questions to the witnesses. What stands for our determination in the circumstances, is whether such anomaly was fatal so as to vitiate the entire proceedings. We will take off with our task to tackle this question by first, looking at the provisions that regulate the participation of assessors in Criminal trials. It has been provided under the provision of section 265 of the Criminal Procedure Act, Cap 20 RE 2002 (the CPA), that, all trials in the High Court have to be with the aid of assessors. In its own words the provision has been couched in mandatory terms thus:

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

And, the role of assessors during criminal trials has clearly been elaborately under the provisions of section 177 of the Evidence Act 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."*

[Emphasis supplied.]

What can be discerned from the wording of the latter provision quoted above is that, the questions to be put to the witnesses by assessors are at the permission of the trial Judge, and that, have to be reflective of the role played by the Court of being impartial. And, the reason for such impartiality is not farfetched in that, being part and parcel of the Court the assessors have to strictly conduct themselves as umpires.

Our next move is the consideration as regards the business of examination, cross-examination and re-examination during criminal trials. The provision of section 146 of the Evidence Act, spells out in elaborate as to what it is all about where it stipulates thus:

> *"146. Examination of witnesses.*
>
> *(1) The examination of witness by the party who calls him is called examination in-chief.*
>
> *(2) The examination of a witness by the adverse party is called his cross-examination.*
>
> *(3) The examination of a witness, subsequent to the cross-examination, by the party who called him is called his re-examination."*

The provision of section 147 of the Evidence Act, moves further to spell out the order in which the examination in chief, cross-examination and re-examination of witnesses during criminal trials under the provision of section 146 of the Evidence Act, have to be taken, that is:

> *"(1) Witnesses shall be first examined-in-chief, then (if the adverse party so desires) cross-examined, then (if the party calling them so desires) re-examined.*
>
> *(2) The examination-in-chief must relate to relevant facts, but the cross-examination need not be confined to the facts to which the witness testified on his examination-in-chief.*
>
> *(3) The re-examination shall be directed to the explanation of matters referred to in cross-examination; and if new matter is, by permission of the court, introduced in re-examination, the adverse party may further cross-examine upon that matter.*
>
> *(4) The court may in all cases permit a witness to be recalled either for further examination-in-chief or for further cross-examination and if it does so, the parties have the right of further*

cross-examination and re-examination respectively.

(5) Notwithstanding the other provisions of this section, the court may, in any case, defer or permit to be deferred any examination or cross-examination of any witness until any other witness or witnesses have been examined-in-chief, cross-examined or, as the case may be, further examined-in-chief or further cross-examined."

Still on cross-examination, the provision of section 155 of the Evidence Act, has listed some basic objects in examining a witness during trials, which include:

"(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."

In the light of what has been stipulated by the quoted provisions of law above, it is apparent that, for strict compliance with the stipulation under section 146 (2) of the Evidence Act, cross-examination to a witness is strictly a domain of an adverse party only and nobody else. This Court in the case of **Ramadhani Seifu @ Baharia and Others Vs Republic**, Criminal Appeal No. 221 of 2010 had the occasion of expounding the objects of cross-examination when it stated that:

"The object of cross-examination is to contradict, impeach the accuracy, credibility and general value of the evidence given in chief; to sift the facts already stated by the witness, to detect and expose discrepancies or to elicit suppressed facts which will support the case of the cross-examining party."

Under the circumstances, it cannot be anticipated to find an assessor, who is part of the Court with no interest at all in the matter that is before the Court, cross-examining a witness with the intention of extracting from him any of the objects that have been named in the above quoted holding. The connotation deduced from any cross-examination made by an assessor

to a witness, whether inadvertently or by calculation, is that, he has already taken sides. This was the position deduced by the Court in the case of **Kulwa Makomelo and Two Others Vs Republic**, Criminal Appeal No. 15 of 2014 (unreported), where it was held that:

> *"Where assessors cross-examine witnesses, they necessarily identify themselves with the interests of the adverse party and demonstrate bias, which is a breach of one of the rules of natural justice that is, the rule against bias which is the cornerstone of the principles of fair trial now entrenched in article 13 (6) (a) of the Constitution of the United Republic of Tanzania 1977."*

Unfortunately, the irregularity of assessors being permitted by the trial Judge to cross-examine witnesses in Criminal trials has been recurring severally as it has been noted in this particular session. The position of law is well settled that, whenever assessors are permitted to cross-examine witnesses, such trial is held to be substantially defective and the only remedy available is to nullify such proceedings. See: **Mathayo Mwalimu Vs Republic**, Criminal Appeal No. 147 of 2008, **Francis Alex Vs Republic,** Criminal Appeal No. 373 of 2013, **Omary Rashis @ Makoti Vs Republic**, Criminal Appeal No. 167 of 2015 (all unreported.)

The record in the appeal at hand having established that, assessors did fully participate in cross-examining witnesses, there cannot be any gainsay in holding that, the said proceedings were substantially defective and cannot be left to stand. In line with what was held in the above cited decisions, we hereby quash the proceedings of the trial Court, and set aside its judgment and the death sentence that was imposed to the appellant. We do this by virtue of the revisioal powers bestowed upon us under the provision of section 4 (2) of the AJA. And regard being to the nature of the offence faced by the appellant, that is a Capital offence, we order for retrial before another Judge with new set of assessors. For interests of justice, such trial has to be expedited.

Order accordingly.

DATED at **MBEYA** this day of October, 2017.

K. M. MUSSA
JUSTICE OF APPEAL

R. E. S MZIRAY
JUSTICE OF APPEAL

S. S. MWANGESI
JUSTICE OF APPEAL