IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

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

CRIMINAL APPEAL NO. 70 OF 2015

MALAMBI S/O LUKWAJA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the judgment of the High Court of Tanzania at Sumbawanga)

(Sambo, J.)

dated the 13th day of March, 2014

in

Criminal Sessions Case No. 11 of 2011

JUDGMENT OF THE COURT

2nd & 9th October 2017

NDIKA, J.A.:

The appellant was condemned to suffer death and he is now challenging that decision. The High Court sitting at Sumbawanga (Sambo, J.) found it established that, with malice aforethought, the appellant, on unknown date, killed Ibrahim s/o Juma at Igalula Village within Mpanda District in Rukwa region.

Briefly, the prosecution led evidence to the effect that on 9th July 2009 at 6.00 a.m. the deceased left his home on a bicycle for the appellant's home to collect rice that the appellant owed him. According

to his widow (PW8 Amisa d/o Hassan), the deceased carried with him on that day empty polythene bags for packing the rice expected to be collected, bed sheets and a small radio. As it turned out, the deceased did not return home for over three weeks. After a family discussion over the matter, the deceased's son (PW1 Juma Ibrahim) and his friend (PW2 Hussein Juma) took upon themselves the task of tracing the deceased all the way to the appellant's home. They told the Trial Court that on asking the appellant as to the deceased's whereabouts, he looked nervous and then acknowledged that the deceased had indeed visited his home on the fateful day and then left for another destination, leaving behind the empty bags and radio. Both PW1 and PW2 saw the bags and radio at the appellant's home but these items were not tendered in evidence.

The suspicious circumstances of the disappearance of the deceased were reported to the local leadership and the police following the arrival of PW1 and PW2 back home whereupon the appellant was arrested as a suspect. Meanwhile a search party comprising PW3 Idd Said Mwanambogo and PW4 Ramadhan Juma Kawambabusha and PW5 Mashaka Mussa went to the appellant's home. They combed that home and a nearby paddy farm after the appellant's wife had confirmed to

them that the deceased had indeed visited their home on the material day and that her husband took him later to their adjoining rice processing and storage facility known as *Kilindio* where they both spent the night together. On the following day, the appellant returned home alone and it was subsequently found that the *Kilindio* had been burnt down. The appellant's wife, however, was not summoned as a witness.

PW3, PW4 and PW5 adduced that in the course of scouring the appellant's property on the basis of the leads gathered from his wife, they discovered and exhumed from the *Kilindio* area what they identified as the deceased's body. They also unearthed the deceased's bicycle from paddy residues on the same area as well as his *yebo yebo* sandals covered in a polythene bag alongside a blood stained machete. Subsequently, the Police visited the scene and collected the body along with other discovered materials.

PW6 Dr. Bernard Masanja Mbushi, who conducted a post-mortem examination of the discovered body, tendered a report (Exhibit P.1) indicating the cause of death as severe haemorrhagic shock following the deceased suffering a deep sharp cut on the neck through the trachea.

The prosecution case also relied upon an extrajudicial statement dated 20th August 2009 tendered by a justice of the peace, PW7 David Daniel Mbembela (Exhibit P.2). In that statement, the appellant confessed to the murder.

In his defence, the appellant denied liability for the alleged murder. Although he acknowledged his indebtedness to the deceased to the tune of TZS. 200,000.00 at the time, he refuted the claim that the deceased's body, radio and bicycle were found at his home. As regards the extrajudicial statement, he contended that it was involuntary because he made it on orders of a certain Police Officer whose name he did not disclose.

All the three lady and gentlemen assessors who sat with the learned Trial Judge took the view that the appellant was guilty of murder. The learned Trial Judge accepted the assessors' opinion and found that the circumstantial evidence particularly based upon the testimonies of PW3, PW4, PW5 and PW8 supported by the appellant's own confession in the extrajudicial statement (Exhibit P.2) sufficiently established the appellant's guilt beyond reasonable doubt.

The appellant now seeks to overturn the Trial Court's verdict on three grounds of appeal as follows:

> *"1. That the trial and the judgment of the High Court were null and void occasioned by the cross-examination of witnesses contrary to sections 146 and 147 of the Evidence Act, Cap. 6 RE 2002.*
>
> *2. That the trial High Court erred in law and fact in basing the conviction of the appellant on the extra-judicial statement of the appellant (Exhibit P.2, at the third line of page 30) which had been illegally obtained from the appellant.*
>
> *3. That the trial High Court erred in law and fact in basing the conviction of the appellant on the recovery of the deceased's body, radio, empty bags and bicycle, all of which the appellant knew nothing about."*

Before us, Mr. Victor Mkumbe, learned Counsel, appeared for the appellant while Ms. Prosista Paul and Mr. Ofmedy Mtenga, learned State Attorneys, represented the respondent.

Arguing the appeal, Mr. Mkumbe, with leave of the Court, adopted his written submissions that he had lodged and prayed that

the appeal be allowed. Before he rested his case, we asked him to address us on whether the trial before the High Court was duly conducted with the aid of assessors in terms of section 265 of the Criminal Procedure Act, Cap. 20 RE 2002 (CPA).

Mr. Mkumbe forthrightly admitted that there was a lack of involvement of assessors in certain portions of the trial. Referring to pages 20, 25, 28, 30 and 34 of the record of appeal, he acknowledged that assessors were not allowed to put questions to witnesses contrary to the requirement of the law. It was, therefore, his view that the trial was rendered a nullity on that ground alone. He thus urged us to nullify the Trial Court's proceedings and order a retrial.

In her submissions for the respondent, Ms. Paul supported Mr. Mkumbe's position and relied upon the decision of this Court in **Abdallah Bazamiye & Others v Republic** [1990] TLR 42. She too urged us to nullify the trial proceedings and quash and set aside the conviction as well as the consequential sentence. She prayed further for an order that the appellant be retried.

As indicated earlier, the requirement for criminal trials before High Court being conducted with the aid of assessors is stipulated by section 265 of the CPA. It states that:

> *"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 added.]

The breadth of the assessors' statutory duty to aid the Trial Judge and how it ought to be performed are two issues that the Court addressed in **Abdallah Bazamiye** (supra). The Court held in that case, at page 44, that:

> *"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. "[Emphasis added.]

Although in the aforesaid case the Trial Court allowed the assessors to give their non-binding opinions at the end of the trial in accordance with section 298 of the CPA, it was established that the learned Trial Judge did not give the assessors an opportunity to put questions to the witnesses. Accordingly, this Court found that irregularity fatal as it held, at page 45, that:

*"**denying the assessors the opportunity to put questions**, as we are satisfied was the case in the proceedings below, **means that the assessors were excluded from fuiiy participating in the trial**; so to the extent that they were so excluded, and denied their statutory right, they were disabled from effectively aiding the trial judge who could only benefit fully if he took into judicious account all the views of his assessors and those would only emerge from their own appreciation of the case as a whole. Such appreciation would have been*

influenced and shaped partly by the assessors' sheer need to articulate their own questions which cross their minds as they go along, and by their own perception of the factual issues involved, as assisted by the assessors' exchanges with the witnesses and the accused. ***We think that the assessors' full involvement as explained above is an essential part of the process, that its omission is fatal, and renders the trial a nullity.***" [Emphasis added.]

Looking at the record of appeal in the light of the above exposition of the law, it is a glaring fact, as rightly submitted by both counsel, that the three assessors who sat with the learned Trial Judge were on several occasions denied the opportunity to put questions to the witnesses. While as shown on page 20 of the record that one assessor only questioned PW2 Hussein Juma, it can be inferred that the other two assessors were not availed with an opportunity to put questions to that witness. Besides, it is manifest on page 25 that whereas two assessors posed questions to PW5 Mashaka Mussa, the record does not indicate why the other assessor did not put any questions to that witness. It is even worse that none of the assessors

was recorded to have put questions to PW6 Dr. Bernard Masanja Mbushi, PW7 David Daniel Mbembela and PW8 Amisa Hassan as is evident on pages 28, 30 and 34 of the record respectively.

We think that if the learned Trial Judge had invited the assessors to pose questions to the witnesses and that the assessors merely declined the invitation possibly because they did not have any questions to ask, or if they accepted the invitation but asked a line of questions that the learned Trial Judge prevented from being asked for being improper or irrelevant or biased, the record of appeal before us would have indicated in respect of each assessor's turn against a particular witness that questions were actually not asked. As a matter of practice, an assessor's decline of invitation to put questions is signified by words to the effect that questions were "**NIL**" from that assessor (see, for instance, **Abdallah Bazamiye** (supra)). Indeed, we note from page 20 of the record that the learned Trial Judge followed that practice by indicating that questions were "**NIL**" from the third assessor when he was invited to put questions to PW3 Idd Said Mwanambogo after the first two assessors had taken their turns. We are obviously perturbed as to why the learned Trial Judge did not

follow that practice consistently if at all he accorded the assessors the opportunity to put questions throughout the trial but that the said assessors, at times, declined to ask questions. In the circumstances, it must be concluded that the assessors were denied the opportunity to put questions to the witnesses on all the occasions we have indicated earlier.

Based on the foregoing analysis, we agree with the parties that the proceedings before the Trial Court are a nullity.

Before taking our leave of the matter as the above determination is sufficient to dispose of this appeal, we feel obliged to make a few observations on the appellant's complaint in the first ground of appeal that the learned Trial Judge erred in law in allowing the assessors to cross-examine the parties.

In his written submissions, Mr. Mkumbe criticised the Trial Court for allowing the assessors to cross-examine all prosecution and defence witnesses contrary to the dictates of sections 146 and 147 of the Evidence Act, Cap. 6 RE 2002. He located the impugned cross-examination on pages 18, 20, 22, 23, 24 and 25 of the record. Citing the unreported decision of this Court in **Chrisantus Msingi v**

Republic, Criminal Appeal No. 97 of 2015 for its holding that such cross-examination by assessors in a criminal trial is an incurable irregularity, he implored us to nullify the entire trial proceedings for that infraction.

As already stated, the assessors' statutory mandate is to put questions to the witnesses in line with the terms of section 177 of Cap. 6 (supra) as well as expressing their non-binding opinions in accordance with section 298 of the CPA. It is not their duty to cross-examine (or re-examine) witnesses. It is settled that assessors' cross-examination of witnesses is an incurable irregularity as it impairs the fairness of the trial: **Chrisantus Msingi** (supra) cited by Mr. Mkumbe; see also the following unreported decisions of this Court in **Mathayo Mwalimu and Another v Republic**, Criminal Appeal No. 147 of 2008; **Elias Mtati @ Ibichi v Republic**, Criminal Appeal No. 65 of 2014; **Republic v Crospery Ntagalinda @ Koro**, Criminal Appeal No. 73 of 2014; and **Kulwa Makomelo and Two Others v Republic**, Criminal Appeal No. 15 of 2014.

Looking at the record, we note that the learned Trial Judge signified the examination-in-chief of each witness with a prefix "**XD**"

while letters "**XXD**" and "**RXD**" denoted the cross-examination and re-examination of the witnesses respectively. We note further that the questioning by the assessors was done after each party's closure of re-examination of its witness and that it was preceded by the prefix "**XD**", not "**XXD**". On this basis, we do not agree with Mr. Mkumbe's deduction that the assessors' questioning of witnesses was essentially cross-examination as the Trial Court did not identify or designate it as such. Moreover, while we acknowledge that the Trial Court's use of the prefix "**XD**" to designate the assessors' questioning seems inexact to signify that the assessors actually executed their role of putting questions to witnesses, we are disinclined to find them to have engaged in cross-examination of the witnesses.

Given the grave consequences of allowing assessors to cross-examine witnesses, we find it apposite to counsel that trial judges should ensure that assessors discharge their role within the dictates of the law. In recording the assessors' questioning of witnesses, the Court should use such prefixes or phrases that would clearly and accurately signify that the assessors actually put questions to witnesses. A phrase like "**Questions by Assessors**" or a prefix such as "**QD**" appear more

appropriate to depict the assessors' obligation to put questions to witnesses.

In sum, based upon our earlier finding that the trial before the High Court was vitiated by the denial of the assessors of the opportunity to put questions to some of the witnesses, we nullify the entire trial proceedings. Accordingly, we quash and set aside the appellant's conviction and sentence and order his retrial. In the meantime, it is further ordered that the appellant should remain in custody whilst he awaits the resumption of the trial.

DATED at **MBEYA** this 9th day of October, 2017.

K. M. MUSSA
JUSTICE OF APPEAL

S. S. MWANGESI
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

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

E. Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL