IN THE COURT OF APPEAL OF TANZANIA

AT BUKOBA

(CORAM: MBAROUK, J.A., MKUYE, J.A. And WAMBALI, J.A.)

CRIMINAL APPEAL NO. 181 OF 2017

HILDA INNOCENT.....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Karagwe)

(Bongole, J.)

dated the 26th day of May, 2017

in

Criminal Session Case No. 69 of 2014

RULING OF THE COURT

28th August & 6th September, 2018

WAMBALI, J.A.:

The appellant is aggrieved by the judgment of the High Court in which she was convicted of the offence of murder contrary to section 196 of the Penal Code Cap. 16 R.E. 2002 (the Penal Code) and sentenced to suffer death by hanging. It was alleged that the appellant murdered one Innocent

Kiiza (her husband) at Kumuli village within Kyerwa District within Kagera Region on the 28th January, 2014 at 20:00 hours.

It is against that background that the appellant lodged the present appeal in this Court comprising seven grounds of appeal. When the appeal was called on for hearing, Mr. Mathias Rweyemamu, learned advocate appeared to represent the appellant while Mr. Athumani Matuma, learned Senior State Attorney appeared to represent the respondent Republic.

From the outset, before the counsel for the appellant and the respondent Republic were allowed to submit on the grounds of appeal, we required them to address us on whether in the circumstances of the trial which was conducted the by the High Court, it could be concluded that assessors participated fully as require by law. The Court raised this matter ***suo motu*** as it was apparent that although it was not part of the complaints of the appellant, according to the record of appeal, the assessors did not participate when three witnesses for the prosecution testified. We, therefore, thought that this is an important matter to be addressed first, before dealing with the grounds of appeal.

In his response, Mr. Rweyemamu, readily conceded that although the appellant did not point out the issue of participation of assessors directly in her grounds of appeal, but he was of the view that the assessors were not given opportunity from the beginning of the trial to participate in that trial as required by law. He explained that as per the record of the trial court, it is not evident that the assessors were informed about their role and responsibility before the trial started. He argued further that from pages 12-22 of the record of appeal, it is evident that the assessors did not participate in possing questions to three witnesses namely PW1, PW2 and PW3 who testified for the prosecution. He submitted that their participation is recorded when PW4 and PW5 testified for the prosecution and when the appellant defended herself.

Mr. Rweyemamu, was firm that the irregularity was fundamental and it went to the root of the trial as it contravened the relevant provisions of the law with regard to the participation of assessors in trial before the High Court. In the circumstances, Mr. Rweyemamu argued that as the assessors started to participate at the middle of the trial, even their opinions could not have been meaningful as the summing up notes of the trial judge could not

have reflected the reality of what transpired during the trial apart from the failure to explain relevant points that were address to them. In his view, the assessors could not have benefited from the summing up as when PW1, PW2 and PW3 testified for the prosecution they did not participate fully.

Mr. Rweyemamu thus urged the Court to apply its powers of revision under section 4(2) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2002 (the AJA) and revise the proceedings and judgment of the trial court, quash conviction and set aside the sentence of death by hanging which was imposed to the appellant. He also urged the Court to order a retrial before another judge and a new set of assessors.

When he stood up to respond to the issue that was raised by the Court and the submission of Mr. Rweyemamu, the learned Senior State Attorney for the respondent Republic conceded that as per the record of appeal it is not indicated whether assessors' role and responsibility were disclosed to them by the trial judge. He, however argued that he thought that was not fatal to the proceedings as it is a rule of practice and not a rule of law.

He also conceded that the assessors did not participate fully in asking questions when PW1, PW2 and PW3 testified for the prosecution. However, he firmly submitted that the omission did not occasion injustice on the part of the appellant as assessors finally participated when PW4 and PW5 testified and when the appellant defended herself. He argued further that the assessors also gave their opinion after the trial judge summed up to them on the relevant matters that were involved in the case.

Mr. Matuma was content of his position on the matter and repeatedly insisted that even the summing up of the trial judge to the assessors on the important issues of the law and evidence was adequate as he properly directed them before they gave their opinions. He submitted further that even the issue of circumstantial evidence which was not pointed by the trial judge was properly not disclosed to the assessors as the same had been overtaken by event after the defence of the appellant in which she admitted to have killed her deceased husband in the course of the fight.

Mr. Matuma nevertheless, urged the Court that, if we find that the non-participation of the assessors at the beginning of the trial was an illegularity which offended the requirement of the law, the evidence of PW1, PW2 and

PW3 be expunged from the record of the trial under section 169 (3) of the Criminal Procedure Act, Cap. 20 R.E. 2002 (the CPA) as this Court did in its decision in **Janta Joseph Komba and three others v. The Republic**, Criminal Appeal No. 95 of 2006 (unreported).

In conclusion, Mr. Matuma submitted that he did not agree with the submission of Mr. Rweyemamu on the consequences which should follow if the Court finds that participation of the assessors was irregular, it should order retrial. He submitted that if the Court expunges the evidence of PW1, PW2 and PW3, the appeal could still be heard on the remaining evidence of PW4 and PW5 and the defence of the appellant (DW1). Indeed, he confidently argued that the prosecution will only depend on the evidence of PW4 if the appeal is heard on merit. He urged the Court also to find that the summing up to the assessors which was done by the trial judge was proper.

From the submission of the counsel for the appellant and the respondent Republic, it cannot be doubted that the participation of the assessors at the trial which ended up with the conviction and the sentence

of death to the appellant leaves much to be desired with regard to the compliance with the law.

The issue which we need to determine is whether the said irregularity vitiated the proceedings and the resulting conviction and sentence.

We think before going into detail in answering the question, it is imperative for the sake of clarity, to reproduce the relevant provisions of the law concerning participation of the assessors in trial before the High Court.

To begin with section 265 of the CPA provides: -

> *"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."*

Yet section 266(1) of the CPA provides: -

> *"(1) Subject to the exemptions under the provisions of section 267 and subsection (2) and subsection (3) of this section, all persons between the ages of twenty-one and sixty years shall be liable to serve as assessors."*

Furthermore, Section 283 of the CPA provides: -

> *" If the accused person pleads "not guilty" or if the plea of "not guilty" is entered in accordance with provisions of section 281, the court shall proceed to select assessors, as provided in section 285, and to try the case."*

Moreover, section 285 of the CPA provides: -

> *"(1) When trial is to be held with the aid of assessors, the assessors shall be selected by the Court.*
>
> *(2) An assessor may aid in more than one trial, successively."*

In addition, section 287 of the CPA provides:-

"If the trial is adjourned, the assessors shall be required to attend at the adjourned sitting and at any subsequent sitting until the conclusion of the trial."

Indeed, section 288 of the CPA provides that: -

"When the assessors have been chosen the advocate for the prosecution shall open the case against the accused persons and shall call witnesses and adduce evidence in support of the charge."

Section 298 of the CPA is also important reference with respect to the summing up to assessors. It provides as follows:

"(1) *When the case on both sides is closed, the judge may sum up the evidence for the prosecution and the defence and shall then require each of the assessors to state his opinion orally as to the case generally and as to any specific question of fact addressed to him by the judge, and record the opinion.*

(2) The judge shall then give judgment, but in doing so, shall not be bound to confirm to the opinion of the assessors.

(3) .....N/A

(4) Nothing in this section shall be construed as prohibiting the assessors, or any of them, from retering to consider their opinions if they so wish or, during any such retirement or at any time during the trial, from consultation with one another."

On the other hand, section 277 of the Tanzania Evidence Act, Cap. 6 R.E. 2002 provides as follows: -

"177. In cases tried with the aid of assessors, the assessors may put any question to the witnesses, through or by leave of the judge, which the judge himself might put and which he considers proper."

From the above quoted provisions of the law, we need not over emphasize that no one can doubt the fact that in any trial before the High Court in which assessors are involved, their full participation cannot be taken as a mere formality of the law, but a necessity. The law is clear that assessors are part and parcel of the trial before the High Court and thus a trial judge must ensure that the assessors participate at every stage of the trial from the beginning to the end as required by law.

It is in this regard that this court in a number of its decisions has stressed the importance of participation of assessors in a trial before the High Court. One of the decision on this point is **Abdallah Bazamiye and others v. Republic,** [1990] TLR 42 in which the Court stated:

> "(1) *It is not the duty of assessors to cross-examine or re-examine witnesses or the accused. The assessor's 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-bindng opinions under section 298 of the Criminal Procedure Act, 1985;

(2) Denying the assessors the opportunity to put questions means that the assessors were excluded from fully participating in the trial; to the extent that they were denied their statutory right, they were disabled from effectively aiding the trial judge who could only benefit fully as he could have if he had taken into judicious account all the view of assessors;

(3) Assessors, full involvement in the trial is an essential part of the process, its omission is fatal, and renders the trial a nullity."

We are of the considered opinion that that decision of the Court summed up the most important aspects on the need for the assessors to

participate fully in the trial before the High Court and the consequences that follow in case their participation is restricted by any means.

It follows that, the High Court cannot conduct trial in which the assessors are supposed to be involved without their presence. In **Iddi Muhidini @ Kabatamo v. Republic**, Criminal Appeal No. 101 of 2008 (unreported), this Court considered the consequences of conducting a trial in the absence of assessors and observed that it is a statutory requirement as per section 265 of the CPA that all trials before the High Court shall be with the aid of assessors. The Court emphasized that their number should not be less than two. The Court also made it clear that if the record does not show that the assessors were present during a trial, then such proceedings are but a nullity.

It is instructive to note that involvement of the assessors as per section 285(1) of the CPA (quoted above) begins with their selection. The trial judge therefore must indicate in the record that the assessors were selected, followed by asking the accused person if he objects to the participation of any of the assessors before the commencement of a trial. This must usually be followed by the usual practice that the trial judge must inform and explain

to the assessors their role and responsibility during the trial up to the end where they are required to give their opinions after summing up of the trial judge. It is in this regard that this Court observed in **Tongeni Naata v. Republic**, [1991] TLR 54 that;

> *"It is a sound practice and should be followed, to give an opportunity to an accused to object to any assessors."*

Indeed, in **Laurent Salu & 5 others v. Republic**, Criminal Appeal No. 176 of 1993 (unreported) this Court went further and observed that:

> *"Admittedly the requirement to give the accused the opportunity to say whether or not to object to any of the assessors is not a rule of law. It is a rule of practice which, however, is now well established and accepted as part of the procedure in the proper administration of criminal justice in the country ... the rule is designed to ensure that the accused person has a fair trial and to make the accused person has*

a fair trial and to make the accused person have confidence that he is having a fair trial, it is of vital importance that he be informed of the existence of this right. The duty to inform him is on the trial judge, but if the judge overlooks this, counsel who are officers of this Court have equally a duty to remind him of it."

We wish therefore to state that while we associate ourselves with the above observation of this Court on the requirement of the trial court to inform the accused of the right to object or otherwise on the participation of any assessor, we go further and observe that it is equally important that although informing the assessors on their role and responsibility is a rule of practice and not a rule of law, as it is for a long time an established and accepted practice in order to ensure their meaningful participation, a trial judge must perform this task immediately after ascertaining that there is no any objection against any of the assessor by the accused before commencing the trial. It is also a sound practice that a trial judge has to show in the record that this task has been fully performed. For even logic dictates that

whenever a person is called upon to assist in performing any task or to offer any service, he must be fully informed of what is expected of him in performing that task. Thus failure to inform assessors on their role and responsibility in the trial diminishes their level of participation and renders their participation which is a requirement of the law meaningless.

In the present matter, in order to appreciate what transpired before the trial and after the trial commenced as far as involvement of assessors is concerned, we feel constrained to reproduce albert briefly what the record indicates at page 12 of the proceedings:

> *"Assessors:*
>
> *1. Brown Kalokola aged 58 years.*
> *2. Jadida w/o Abdallah 42 years.*
> *3. Prosper Ernest 34 years.*
>
> *Sgd. S. B. Bongole, J.*
>
> *25/4/2017*
>
> ***Any objection to the assessors present:***
>
> *Mr. Rweyemamu - I have no objection.*
>
> *Sgd: S. B. Bongole, J*
>
> *25/4/2017.*
>
> **PROSECUTION CASE OPENS."**

From there, the trial court proceeded to record the evidence of PW1, PW2 and PW3 without any involvement of the assessors in asking questions as required under section 177 of the Tanzania Evidence Act, Cap. 6 R.E. 2002. It was until 27/4/2017 when the trial resumed after it was adjourned on 25/4/2017, as 26/4/2017 was a public holiday, when the assessors were involved in asking questions when PW4 started to testify onward.

It is worth to note that even after they started to participate, their involvement was not substantial, as in view of the record, some of them did not ask questions at all. This is apart from the fact that although it is not compulsory that the assessors must ask questions all the time and to any witness and the accused during the trial. Our observation is based on the fact that even on 27/4/2017 when the assessors participated, it is not indicated if they were readily informed of their role and responsibility in the trial at all by the trial judge. It is also not clear, and the record is silent, if they were informed on their role and responsibility before the trial started although they were formally selected as required by the law.

We hardly need to observe that when asked to participate in the trial, the assessors should not only sit in court with the trial judge as observers,

but they must listen attentively to the testimonies of witness for both sides and when the occasion arises they must actively participate in posing questions if any to any witness for the purpose of clarifying some important matters. This is aimed to enable them to offer their more viable and valuable independent opinions after a case is summed up to them by the trial judge.

On the other hand, in the present case it cannot be safely submitted that the summing up to the assessors which was done by the trial judge, with respect, was proper as contended by Mr. Matuma. The record is clear that much as they only started to participate fully when the trial was almost towards the end of the prosecution case which attracted five witnesses. We take note and appreciate the forceful arguments of the learned Senior State Attorney for the respondent Republic who argued that the summing up to the assessors by the trial judge was not vitiated by their partial participation in the trial. Nevertheless, we do not, with due respect, agree with his position on this matter. This is so because;

First, upholding the part participation of the assessors in the trial will be defeating and derogating the importance of the relevant provision of the law, that is, section 265 of the CPA which requires such trial to be with aid

of assessors and be part and parcel of the trial before the High Court. Indeed, section 287 requires assessors to fully participate in the trial by attending the hearing of the case from the beginning to the end even after the case is adjourned, in which they must be present at the resumed hearing. We think, in the present matter we have amply demonstrated above that the participation of the assessors did not conform to the mandatory provisions of the law.

Second, if we buy-in the submission of Mr. Matuma that the proper way is for the Court to expunge the evidence of PW1, PW2 and PW3 in which the assessors did not participate and proceed to consider the appeal on the remaining evidence on record and the summing up to the assessors and the judgment that was delivered by the High Court, it will be defeating the requirement of the law. Indeed, to do so will be to overlook the mandatory requirement of sections 265 and 287 of the CPA which requires assessors to be part and parcel of the trial and participate fully throughout the trial proceedings at the High Court.

It is instructive to point out that this Court has in many occasions stated that assessors are an integral part of the trials which are conducted

before the High Court. We think the decision of the Court in **Abdallah Bazamiye and 5 others** (supra) carries the message which we intend to convey in respect of the case that brought about this appeal by the appellant.

Third, we think that in **Janta Joseph Komba and 3 others v. Republic**, Criminal Appeal No. 95 of 2006 (supra) which was referred by Mr. Matuma, the circumstance that compelled the Court to resort to section 169(3) of the CPA to expunge the statements of the appellants that were, obtained illegally are distinguishable with the circumstances which are found in the trial against the appellant at the High Court.

In the present matter the issue is not on admissibility of evidence, but the participation of assessors throughout the proceedings. It is our considered opinion that expunging the evidence of PW1, PW2 and PW3 in which the assessors did not fully participate despite their being present in court, will be defeating the requirement of the law, which requires not only their presence at the trial but also their active participation throughout the trial. We are of the firm view that in **Janta Joseph** (supra) the Court came to a conclusion to expunge evidence due to the irregularity in the admission of evidence (the statements of the appellants). We wish to reproduce what

the Court stated at page 16 of the unreported judgment before it came to that conclusion:

> " *The prosecution did not show how the admission of the appellants' statements in the circumstances of this case would " specifically and substantially" benefit the public interest without unduly prejudicing the rights and freedom of any person."*

We are therefore of considered opinion that the provision of section 169(3) of the CPA cannot be brought into play in the circumstances of the trial against the appellant which was conducted by the High Court.

Fourth, we are of the firm view that apart from the fact the trial judge did not properly sum up on the vital points of the law and salient facts of the case to the assessors, the summing up notes could not have validly reflected what transpired in court in the presence of assessors, as they did not participate fully when PW1, PW2 and PW3 testified for the prosecution. Yet, the trial judge summed up and made observations on the law and on the

impression of the evidence of those witnesses (PW1, PW2 and PW3) and later required the assessors to give their opinions.

In the event, we agree with Mr. Rweyemamu, learned advocate for the appellant that the partial, if not minimal participation of the assessors, vitiated the trial court proceedings and the resulting conviction and sentence against the appellant. The trial court omission that occurred during the trial prejudiced the appellant. We do not, therefore, with respect, agree with Mr. Matuma that the appeal can proceed on merit on the evidence of PW4, PW5, the defence and the summing up notes to the assessors.

In the end, we are left with no other option other than to invoke the provisions of section 4(2) of the AJA and nullify the proceedings and the judgment of the trial court, quash conviction and set aside the sentence of death that was imposed on the appellant.

We accordingly, in view of the circumstances of this case order a retrial before another judge and a new set of assessors. We direct that as the appellant has been in custody since 2014 when she was arrested in

connection with the offence of murder, a retrial should be expedited for the interest of justice. We so order.

DATED at **BUKOBA** this 6th day of September, 2018.

M. S. MBAROUK
JUSTICE OF APPEAL

R. K. MKUYE
JUSTICE OF APPEAL

F. L. K. WAMBALI
JUSTICE OF APPEAL

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

E. Y. MKWIZU
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL