IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MBAROUK, J.A., MZIRAY J.A., And MWAMBEGELE, J.A.)

CRIMINAL APPEAL NO. 181 OF 2016

ANDERSON S/O NJOKI.....APPELLANT
VERSUS
THE REPUBLIC .....RESPONDENT

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

(Bahati, J.)

dated 2nd day of June, 1992
in
Criminal Session No. 17 of 1991

JUDGMENT OF THE COURT

7th & 23rd February, 2018

MBAROUK, J.A.:

In the High Court of Tanzania at Morogoro, the appellant Anderson s/o Njoki was charged with the offence of murder contrary to section 196 of the Penal Code. The information stated that, the appellant and one Mussa Chimile (not subject to this appeal) jointly and together murdered one Philemon Chimile on 6th day of May, 1990 at Matale village within the District of Kilosa, Morogoro Region.

At the trial court, it was not in dispute during the preliminary hearing that the two accused persons on 6th May, 1990 were given the deceased Phillemon Chimile to escort him to Gairo Police Station. It was also not in dispute either that Mussa Chimile was the young brother of the deceased and the journey to Gairo was undertaken on foot.

In his testimony before the trial court, Wilson Sahaba (PW1) testified that, as a militiaman he was handed over Phillemon Chimile (the deceased) on 6th day of May, 1990 at around 9 p.m. to take him to Gairo Police Station after being suspected to have set fire to the house of the appellant. On their way to Gairo on foot, Mussa Chimile started quarreling with the deceased saying that let them take him to the police station, but when they return he would kill one of them. PW1 further testified that, while at river Idebo the appellant made him to fall down by hitting his legs and then took the rope which was tied to the deceased and stabbed him (the deceased). PW 1 managed to run away, and after reaching

the village, he made a call for help. At the CCM Office, PW1 told those who responded to the call what transpired and the village secretary asked them to leave everything to him. When cross examined, PW1 responded by saying that he did not see the appellant with a knife, but at the CCM Office he told the CCM Secretary that the deceased was killed by the appellant.

In his defence, the appellant averred that after having heard the deceased using abusive and insulting language that he was going to kill him after his release and considering the grief after his house was set on fire, he found himself holding the deceased and stabbed him with a knife which he had in his shirt pocket. He said, the deceased fell down, assisted by Mussa, they put him out of the water from the river and went back to the village. On the next day, the appellant further said, he took the deceased's body alone to a drier place and buried it. He then reported the matter to the village Secretary that he had stabbed to death the

deceased and later after a month he was arrested and sent to the police station and later to the justice of the peace.

After a full trial, the trial High Court acquitted Mussa Chimile and found the appellant guilty and convicted him accordingly. He was then sentenced to suffer death by hanging.

Dissatisfied, the appellant seeks to challenge the decision of the trial court. In this Court initially, the appellant preferred a memorandum of appeal on 7th day of March, 2017 containing three grounds of complaint. Thereafter on 1st day of February, 2018, he filed a supplementary memorandum of appeal containing three grounds. However, at the hearing of the appeal, Mr. Aloyce Sekule, learned advocate for the appellant opted to withdraw the first memorandum of appeal filed on 7th day of March, 2017 and left with the supplementary memorandum of appeal. Mr. Sekule, then prayed to abandon the third ground of appeal and remained with the two following grounds of complaint:

1. *That, the learned trial Judge erred in law and in facts for failure to give an opportunity to the Appellant and /or his defence Counsel to object to the tendering to the Report on Post-Mortem examination, Exh. P1 and Extra-Judicial Statement, Exh. P2 which were tendered and admitted without given a chance and/or right to say something in connection with the alleged exhibits.*

2. *That, the learned trial Judge erred in law and in fact in allowing the Assessors to cross-examine witnesses the act which violated the mandatory requirement of the Tanzania Evidence Act, [CAP 6 R.E. 2002].*

He started his submission by arguing the second ground of appeal which is to the effect that, the mandatory requirement under section 177 of the Tanzania Evidence Act was contravened when the trial judge allowed the assessors

to cross-examine witnesses. He proceeded by submitting that, in this case, witnesses from both sides were cross examined by the assessors. He further submitted that, going by the record of appeal, it is not hard to find out that at pages 9, 12 and 13, the assessors were allowed to cross-examine the prosecution witnesses. Also at pages 18 and 19 of the record of appeal again shows that the assessors were allowed to cross-examine the defence witness (the appellant). In support of his contention, Mr. Sekule cited to us two decisions of this Court **Chrisantus Msingi v. Republic,** Criminal Appeal No. 97 of 2015 and **Mashaka Juma Ntalula v. Republic,** Criminal Appeal No. 159 of 2015 (both unreported), where this Court held that, the defect of assessors to cross-examine witnesses is an incurable irregularity and the trial becomes flawed. For that reason, Mr. Sekule urged us to quash all the proceedings, conviction and set aside the sentence. He finally prayed for the appellant to be set free.

On his part, Mr. Credo Rugaju, learned Senior State Attorney representing the respondent/Republic submitted that, he was at one with Mr. Sekule's submission on the issue raised in that ground of appeal. He therefore urged us to nullify the trial High Court's proceedings and judgment and consequently, order a retrial, before another judge and a new set of assessors, because there is enough evidence against the appellant.

In rejoinder submissions, Mr. Sekule reiterated what he had submitted earlier.

In the instant appeal, we have found it prudent to fully agree with both counsel representing the parties herein. This is because, going by the record of appeal it is evident that the accessors were allowed to cross-examine witnesses of both sides in this case as pointed out earlier by Mr. Sekule.

To begin with, section 265 of the Criminal Procedure Act, Cap. 20 R.E. 2002 (the CPA) provides as follows:-

*"**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].

We are increasingly of the view that, the law is very much clear that in a trial with the aid of assessors the trial judge may allow assessors to put questions to witnesses. This is in accordance with section 177 of the Evidence Act, Cap. 6 R.E. 2002, which provides as follows:-

"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."

Whereas, in terms of section 290 of the CPA, it is not the duty of assessors to cross-examine witnesses or the accused person. Section 290 of the CPA provides as follows:

"The witnesses called for the prosecution shall be subject to cross-examination by the accused person or his advocate and to re-examination by the advocate for the prosecution".

Furthermore, section 146 of the Evidence Act sets out the order of examining witnesses, and provides as follows:-

"(1) The examination of a witness by the party who calls him shall be called his examination-in chief.

(2) ***The examination of a witness by the adverse party shall be called his cross-examination.***

(3) The examination of a witness, subsequent to the cross-examination by the party who called him, shall be called his re-examination."

[Emphasis added].

In interpreting the provisions of section 146 of Evidence Act, this Court in the case of **Kulwa Makomelo**

and Another v. The Republic, Criminal Appeal No. 15 of 2014 (unreported) stated that:-

> *"From the wording of section 146 cross-examination of a witness is the exclusive right of an adverse party."*

Earlier; before the decision of **Kulwa Makomelo's case** (supra), this Court in **Mathayo Mwalimu and Another v. The Republic,** Criminal Appeal No. 174 of 2008 (unreported) specifically stated that:-

> *"....the function of cross-examination is to the exclusive domain of an adverse party to a proceeding."*

Again in **Abdallah Bazamiye & Another v. The Republic** [1990] TLR 42, this Court held that:-

> *"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 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 implicit in the judge not stopping them from putting their questions."

All in all, from the above cited quotations, it is our considered opinion that, the role and duty of assessors in criminal trials is to put questions to witnesses and not to cross-examine them. We are further of the view that, it is the domain of an adverse party to cross-examine a witness and not the assessors. Allowing assessors to cross-examine witnesses renders the proceedings and trial to be a nullity. In

finding the effect of allowing assessors to cross examine the witnesses, this Court in the case of **Omary Rashid @ Makoti v. The Republic,** Criminal Appeal No. 167 'B' of 2015 (unreported), held as follows:

> *"What then is the effect of the irregularity? We have no difficulty in answering that issue. It is a settled position of the law that where in a trial, the assessors were allowed to cross-examine witnesses, the irregularity vitiates the trial. As argued by both counsel for the parties, by cross-examining witnesses, the assessors acted beyond their role, stepping into the functions of an adverse party. The result is, certainly, to render the trail unfair."*

Furthermore, in the case of **Amos Wilson @ Sahara Ntibuneka v. The Republic**, Criminal Appeal No. 16 of 2015, (unreported) this Court held as follows:-

"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. The irregularity is incurable... (See ***Kabula Luhende v. Republic,*** *Criminal Appeal No. 281 of 2014 and* ***Kulwa Makomelo & Two Others v. Republic*** *Criminal Appeal No. 15 of 2014 (CAT-unreported)."*

All said and done we are hereby constrained to nullify the proceedings, quash the appellant's conviction and set aside the sentence. As to whether we should order a retrial, having considered that the appellant is faced with an offence of serious nature and due to a fact that the irregularity leading to the nullification of the proceedings was occasioned

by the trial court, we are of the view that the retrial is inevitable. We therefore order a retrial before another judge and a new set of assessors.

At this juncture, we do not consider it prudent to consider the remaining ground raised by the appellant, because that ground alone has disposed of the appeal. It is so ordered.

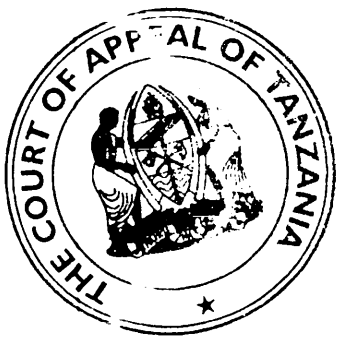
DATED at **DAR ES SALAAM** this 15th day of February, 2018.

M. S. MBAROUK
JUSTICE OF APPEAL

R. E. S. MZIRAY
JUSTICE OF APPEAL

J. C. M.MWAMBEGELE
JUSTICE OF APPEAL

I certify that this is a true copy of the original



A.H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL