IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: MUGASHA, J.A., MKUYE, J.A. And MWANGESI, J.A.)

CRIMINAL APPEAL NO. 97 OF 2016

PANDE JOHN.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Sumari, J.)

dated 6th day of December, 2013

in

Criminal Session Case No. 164 of 2010

JUDGMENT OF THE COURT

10th & 13th July, 2018

MUGASHA, J.A.:

The appellant, Pande John was charged with three counts of murder c/s 196 of the Penal Code, Cap 16 R.E. 2002. The prosecution had alleged that, on 5th December, 2007 at Misisi village, Bunda District, Mara Region, he murdered three family members namely: Sabato d/o Sita, Amina w/o Sita and Kulengwa d/o Sabato. Following a trial, the High Court acquitted the appellant

of the offence of murder, c/s 196 of the Penal Code, substituted it with a conviction for the offence of a lesser offence of manslaughter c/s 195 of the Penal Code and sentenced him to life imprisonment.

Aggrieved, the appellant has appealed to this Court. However, for reasons which will be apparent in due course, we shall not reproduce the grounds of appeal.

At the hearing, the appellant was represented by Mr. Serapion Kahangwa, learned counsel whereas the respondent Republic had the services of Mr. Emmanuel Luvinga assisted by Ms Sophia Mgassa, all learned State Attorneys.

Before embarking on the merits or otherwise of the appeal before us, we *suo motu* required parties to address us whether there was any serious irregularity in the conduct of the trial on account of the participation and role of the three assessors in the proceedings leading to the appellant's conviction.

Mr. Kahangwa submitted that, it is glaring on the record that at the trial, the assessors were allowed to cross-examine the witnesses. This he argued, is an incurable irregularity which vitiated

the trial. Thus, he urged the Court to nullify the entire trial proceedings and order a retrial.

On the other hand, Mr. Luvinga, learned State Attorney, succinctly submitted that the conduct of the trial was irregular as the assessors had cross-examined D/Sgt Matima (PW1), Nyawaye Jogo (PW2) and Pancho Kisure Simba (PW3) and the appellant. Relying on section 177 of the Evidence Act, [**CAP 6 R.E. 2002**], he argued that as the assessors had no authority to cross-examine the witnesses, the trial was nullity having not being conducted with the aid of assessors who basically played the role of adverse party at the trial. To back up his proposition he relied on the case of **LUCIA ANTON @ BISHENGWE VS REPUBLIC,** Criminal Appeal No. 96 of 2016 (unreported). He invited the Court to invoke our revisional jurisdiction under section 4(2) of the Appellate Jurisdiction Act, [**CAP 141 R.E. 2002**] (the AJA) in order to quash and set aside the High Courts' trial proceedings, the conviction, the sentence and make an order for retrial.

Going by the record, on 21/11/2013, three assessors were under section 285(1) of the Criminal Procedure Act [**CAP 20 R.E. 2002**] (the CPA) selected by the trial court without any objection by the appellant. The learned Judge explained to the assessors their task and what was to be expected of them at the conclusion of the case.

In terms of section 265 of the CPA, the role of assessors in a criminal trial is to aid the High Court. In that regard, section 177 of the Evidence Act, gives a proper guide in the manner and nature of questions to be asked by assessors as it provides:

> *"**In cases tried with assessors, the assessors may put any question to the witness**, through or by leave of the court, **which the court itself might put** and which it considers proper".*
>
> [Emphasis added].

On the other hand, section 146 (2) of the Evidence Act statutorily categorises the examination of a witness by the adverse party as cross-examination. In **DAVIS v ALASKA**, 415 U.S. 308, 316

(1974) the Australian Law Reform Commission correctly explained cross-examination as follows:

> *"Cross-examination is a feature of the adversarial process and designed to let a party confront and undermine the other party's case by exposing deficiencies in a witness's testimony (ALRC (102) 2005, Uniform Evidence Law, para 5.70).*

The said explanation features in section 155 (a) and (c) of our Evidence Act which shows that, when a witnesses is cross-examined he may also be asked questions which tend to test, respectively, his veracity or to shake his or her credibility, by injuring his character.

In our respectful view, while the assessors are by law permitted to put questions to witnesses during a trial in order to seek any clarification in the testimony volunteered by the witnesses, they are not permitted to cross-examine witnesses to test the veracity of their testimony or to shake their credibility, by injuring their character, which is beyond their scope. We say so because, in terms of the plain construction of section 177 of the Evidence Act it

is very clear that, the questions that may be put by assessors to the witnesses are those which the court itself might put. As their statutory role under section 265 is to"aid" the court in a fair, impartial and just determination in a criminal trial, assessors cannot serve as adverse party therein.

Furthermore, it is evident under section 146(2) that, cross-examination is the exclusive domain of the adverse party and can only be done by the adverse party and not the assessor. This was emphasized in the case of **CHRISANTUS MSINGI VS REPUBLIC,** Criminal Appeal No. 97 of 2015 (unreported) where we stated:

> *"during trial the examination and cross-examination of witnesses is not the domain of the assessors".*

[See also the cases of **TIMOTH S/O SANGA AND JOSEPH S/O SANGA VS REPUBLIC,** Criminal Appeal No.80 of 2015 (unreported) **LUCIA ANTON @BISHENGWE VS REPUBLIC,** (supra).]

In our considered view, the assessors' cross-examination of PW1, PW2, PW3, and the appellant at issue in the trial and their search for facts from these witnesses tended to test the veracity of

their evidence or credibility and essentially to contradict. This was beyond their mandate and role but also took side of the adverse party's (i.e. respondent) right to cross-examine those witnesses.

With respect, the High Court which under section 177 of the Evidence Act is enjoined to oversee the questions that the assessors may put to witnesses, allowed them to wander into cross-examination, a line of questioning disallowed by the law. The lay assessors' cross-examination, innocent as it may have been, offended section 177 of the Evidence Act and acted beyond the confines of the role ascribed to them in aiding the court under section 265 of the Criminal Procedure Act. (See **WASHINGTON ODINDO VS REX** [1954] 24 EAC 393 and **TULIBUZYO BITURO VS REPUBLIC** [1982] TLR 264, **MATHAYO MWALIMU & ANOTHER VS REPUBLIC,** Criminal Appeal No. 174 of 2008 and **MAPUJI MTOGWASHINGE VS REPUBLIC,** Criminal Appeal No. 97 of 2015 (both unreported).

Moreover, the Court has in a number of decisions categorically stated that the law frowns on assessors' cross examination of

witnesses. The decisions include the case of **KULWA MAKOMELO AND TWO OTHERS VS REPUBLIC**; Criminal Appeal No. 15 of 2014 (unreported) where the Court was confronted with a situation whereby assessors cross-examined witnesses. Thus, the Court said:-

> *"By allowing assessors to cross examine witnesses, the court allowed itself to be identified with the interests of adverse party and therefore, ceased to be impartial. By being partial, the court breached the principles of fair trial now entrenched in the constitution... the breach is not curable under section 388 of CPA".*

Since the role of assessors is to aid the court in a fair dispensation of justice in accordance with section 265 of the CPA we deemed it crucial to restate what we said in **ABDALLA BAZAMIYE VS REPUBLIC,** [1990] TLR 42):-

> *"We might mention here that, in practice, when they put question under section 177 of the Evidence Act*

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 supplied]

It is settled law that the law frowns upon the practice of allowing assessors to cross-examine witnesses in any trial. The next question for consideration is the effect of such an irregularity. The principles of fair trial are embodied under article 13 (6) (a) of the Constitution of the United Republic of Tanzania, 1977 which states:

"To ensure equality before the law, the state authority shall make procedures which are appropriate or which take into account the following principles namely:

When the rights and duties of any person are being determined by any court or agency, that person ***shall***

be entitled to a fair hearing *and to the right of appeal or other remedy against any decision of the court or other agency concerned".*

[Emphasis supplied]

The right to a fair hearing is thus one of the fundamental rights in our jurisdiction. Therefore, once it is shown that the assessors who assist the trial judge in the High Court have cross-examined witnesses, the accused person is taken to have not been accorded a fair trial because the assessors are taken to have been biased. That goes contrary to Article 13(6) (a) of the Constitution of The United Republic of Tanzania. [See **KABULA LUHENDE V REPUBLIC,** Criminal Appeal No. 281 of 2014 and **KULWA MAKOMELO** (supra)].

In the circumstances, the cross-examination of the witnesses by the assessors violated the cardinal principle of law which requires the Court to be fair and impartial. The omission is a fundamental irregularity which went to the root of the trial as such; the appellant did not get a fair trial. [See **BARAKA JAIL MWANDEMBO VS**

REPUBLIC, Consolidated Criminal Appeals No. 102 and 103 of 2014 (unreported)].

In the case at hand, one may be tempted to think that what transpired in court was a mere misnomer and that the proper term the judge should have used was "questions by assessors" instead of "cross-examination". However, we are satisfied that the assessors in this case indeed, did cross-examination not only in form but in substance. For example, the questions put by 1st assessor to PW1 which appear at page 28 of the record. In examination in chief, PW1 on being asked who was killed and the person responsible, he said as an investigator was informed that John Pande was responsible with the murder of Kulengwa Sabato, Amina Sabato and Sabato Sita. The assessor asked the same question and got the same answer. This was the function of cross-examination as it tended to test consistency, not clarification in the witness's testimony. Similarly, in respect of PW2, in examination in chief, on being asked about those present at the time of recording the extra judicial statement he mentioned himself, Nyawahi Jogo, the office attendant and the accused who narrated what is contained in the extra judicial

statement. At page 45 of the record, the 1st and 2nd assessors repeated the same question and got the same answer. Again, this could mean that the assessors were testing the witness's veracity, which according to section 155 (a) of the Evidence Act is the purpose of cross-examination.

With these instances, we are fortified to conclude that the cross-examination by the assessors was true in both form and substance which demonstrate how the assessors acted beyond their statutorily assigned roles having gone to the extent of testing the veracity of witnesses or sometimes shake their credibility. Thus, having played the role of adverse party, the assessors abdicated their role and the learned trial judge failed to properly direct them, hence losing the sanctity of impartiality, the trial was vitiated. [See **MT SGT RHODA AND TWO OTHERS VS REPUBLIC,** Criminal Appeal No. 226 of 2012 (unreported).]

Having considered all the circumstances of the case we find that the irregularity by the trial court in allowing the assessors to cross-examine the witnesses was fundamental and incurable and

occasioned a miscarriage of justice. Accordingly, we exercise our revisional jurisdiction under section 4(2) of AJA, and quash all the trial proceedings and the judgment set aside the appellant's conviction and sentence. For the avoidance of doubt the preliminary hearing remain unaffected. To better meet the ends of justice and in its interest, we order a retrial to be conducted expeditiously before another Judge of the High Court with a different set of assessors. Meanwhile, the appellant should remain in custody while he awaits the resumption of the trial.

DATED at **MWANZA** this 12th day of July, 2018.

S. E. A. MUGASHA
JUSTICE OF APPEAL

R. K. MKUYE
JUSTICE OF APPEAL

S. S. MWANGESI
JUSTICE OF APPEAL

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

B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL