IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

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

CRIMINAL APPEAL NO. 294 OF 2016

1. MATHAYO WILFRED
2. KWATEMA MATHAYO } **... ..... APPELLANTS**
3. JOEL MATHAYO

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania sitting at Babati)

(Maghimbi, J.)

dated the 17th day of February, 2016
in
Criminal Session No. 43 of 2014

JUDGMENT OF THE COURT

MZIRAY, J.A.:

Before the High Court of Tanzania sitting at Babati in Criminal Sessions Case No. 43 of 2014, the three appellants were prosecuted with and convicted of the offence of attempted murder contrary to section 211 (a) and (b) of the Penal code Cap 16 of the Revised Edition, 2002. They were each sentenced to serve 10 years in jail. Aggrieved, they are now before this Court appealing against both conviction and sentence.

It was alleged by the prosecution case that on the 9th day of February, 2012 at about 20.00hrs at Nari Village within Babati District in Manyara Region, the appellants jointly and together did unlawfully attempt to cause death of one Safari s/o Akonay by cutting him severely on several parts of his body including head by using machete and axe.

At the hearing of the appeal, the 1st appellant was represented by Mr Elibariki Maeda, learned advocate. While Mr Daudi Haraka, represented the second appellant, the third appellant was represented by Edna Mndeme. The appellants lodged a joint memorandum of appeal to challenge the trial court decision. We do not, however, propose to consider the grounds raised and submissions made thereof for the reason we shall shortly give.

In the course of hearing the appeal, the Court drew the attention to the learned counsel and asked them to address on two issues;

i. *Whether or not the course taken by the trial High Court Judge in allowing the assessors to cross-examine the witnesses on both sides of the case was proper.*
ii. *Whether or not the learned judge's summing up to the assessors was proper*

Both were at one that the trial was unprocedural on account that the assessors were allowed to cross-examine the witnesses contrary to the provisions of section 177 of the Evidence Act, Cap 6 R.E 2002, which only mandates them to put questions to witnesses. They concluded that, in the light of the said procedural irregularity, which contravened principles of fairness in a trial, the trial was vitiated.

As to the summing up, they were of the view that the same had problem. They forcefully submitted that the trial judge in her summing up to the court assessors did not address them on the issue of alibi raised in defence. Placing reliance to the decision of **Zacharia Joseph & Another V. R,** Criminal Appeal No. 27 of 2016 (unreported) They submitted that the failure by the trial judge to address the assessors on such vital point of law vitiated the proceedings. They also asserted that apart from the glaring errors, the summing up of evidence to the assessors which the trial judge presented to the assessors is in fact missing from the record. On that basis therefore, they urged the Court to nullify the proceedings and order a retrial.

On the other hand, Mr Azael Mweteni assisted by Charles Kagilwa, both learned senior state attorneys conceded to irregularities pointed out. They said,

in the light of the principles of fair trial, assessors are not permitted to cross-examine the witnesses during trial. They contended that the trial court in allowing assessors to cross-examine witnesses was contrary to the law and procedures laid down and that the same vitiated the proceedings. They also expressed their discontent on the manner in which the trial Judge summed up evidence to the assessors. They submitted that in the summing up, the assessors were not addressed on the issue of alibi, which to them considered it vital and material point. They also agreed that the judge's summing up notes were missing from the record. They viewed the procedural irregularities as contravening principles of fairness in a trial and urged us to nullify the proceedings and order a retrial.

We on our part, after carefully reviewing the record of the High Court and the sequence of proceedings upon which the judgment was founded are of the settled view that the procedure adopted by the learned High Court Judge was highly irregular. Assessors are only expected to put questions to the witnesses and not to conduct cross-examination. Section 177 of the Evidence Act, Cap 6 of the Revised Edition, 2002 stipulates 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"

In the instant case as correctly submitted by both parties, the learned High Court Judge allowed assessors to cross-examine the witnesses. With much respect, that was not proper. Assessors are not allowed to cross-examine witnesses as that are the function of an adverse party to proceedings. (See **KULWA MAKOMELO AND TWO OTHERS V R**, Criminal Appeal No. 15 of 2014 (CAT – unreported); **MAPUJI MTOGWASHINGE V R**, Criminal Appeal No. 162 of 2015 (CAT – unreported); **ABDALLAH BAZAMIYE AND OTHERS V R**, [1990] TLR 42).

It is trite law that 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. (See **KABULA LUHENDE V R**,

Criminal Appeal No. 281 of 2014 and **KULWA MAKOMELO** case (*supra*)). That goes contrary to Article 13(6) (a) of the Constitution of The United Republic of Tanzania. The irregularity is incurably defective.

On the issue of summing up, we must confess that the issue of alibi raised in defence was a vital point of law and that the learned High Court Judge ought to have addressed it to the court assessors . Failure to address the assessors on such vital point of law was a misdirection which vitiated the whole trial before the trial court. The learned counsels have correctly articulated the settled position of law regarding the trials in the High Court that are aided by the assessors. There is a long and unbroken chain of decisions of the Court which all underscore the duty imposed on trial High Court judges who sit with the aid of assessors, to sum up adequately to those assessors on all vital points of law. See for instance the case of **Said Mshangama @ Senga v. Republic,** Criminal Appeal No. 8 of 2014. In the said case this Court posed a duty on the trial judge sitting with the aid of assessors to sum up adequately to the assessors on a vital point of law. Where the trial judge falls short of that duty, the resulting trial cannot be regarded to have been conducted with the aid of assessors as required by section 265 of the Criminal Procedure Act. The Court stated:

"...As provided under the law, a trial of murder before the High Court must be with the aid of assessors. One of the basic procedures is that the trial judge must adequately sum up to the said assessors before recording their opinions. Where there is inadequate summing up, non-direction or misdirection on such a vital point of law to assessors, it is deemed to be a trial without the aid of assessors and renders the trial a nullity. (See ***Rashid Ally v. The Republic,*** *Criminal Appeal No. 279 of 2010 – unreported). In Turubuzya* ***Bituro v. The Republic*** *(1982) TLR 204, the Court held:-*

"Since we accept the principle in Bharat's case as being sensible and correct, it must follow that in a criminal trial in the High court where assessors are ***misdirected on a vital point,*** *such trial cannot be construed to be a trial with the aid of assessors. The position would be the same* ***where there is non-direction to the assessors on a vital point ..."*** (Emphasis provided).

In Charles **Samson vs. Republic** [1990] T.L.R. 39,the vital point of law was alibi, and the trial High Court did not take cognizance of this defence in

its summing up to the assessors and in the judgment thus occasioned mistrial and a consequential miscarriage of justice.

We have carefully, considered the argument on the missing summing up. With respect, Page 69 of the record shows the following:-

> ***'COURT:*** *summing up of evidence to the assessors (attached summary of evidence). For the purpose of recording their opinion on the matter."*

We have taken trouble and consulted the typed record of appeal and original record. We found out that the summing up notes to assessors were not in record. We could not therefore in the circumstances verify whether or not the trial judge addressed the assessors on the defence of alibi. On that basis therefore, we cannot say that the appellants were fairly tried.

In light of the foregoing shortcomings, we invoke the revisional powers of this Court under section 4 (2) of the Appellate Jurisdiction Act, Cap 141 (AJA) to quash and set aside the judgment of the trial court. We order the trial record to be remitted back to the High Court for a new trial to commence before another judge and different set of assessors. Since the 2nd and 3rd appellants are not conversant with Swahili language then, an

interpreter should be engaged for that purporses. The appellants shall in the meantime remain in custody to wait for their trial.

It is so ordered.

DATED at ARUSHA this .....day of October, 2018.

B.M. MMILLA
JUSTICE OF APPEAL

R.E.S. MZIRAY
JUSTICE OF APPEAL

S.S. MWANGESI
JUSTICE OF APPEAL