IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

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

CRIMINAL APPEAL NO. 96 OF 2016

LUCIA ANTONY @ BISHENGWE.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Msuya, J.)

Dated the 13th day of December, 2013
in
Criminal Session Case No. 28 of 2012
.....

JUDGMENT OF THE COURT

19th & 24th April, 2018

MUGASHA, J. A.:

The appellant was arraigned before the High Court sitting at Mwanza for the offence of murder, contrary to section 196 of the Penal Code **[CAP 16 R.E. 2002]**. After a full trial, she was convicted as charged and sentenced to death by hanging. She has appealed to the Court.

It was alleged at the trial that, on 18th day of January, 2009, at Baraki Village, within Rorya District, Mara region, the appellant murdered

one Maseke d/o Mwita Maseke. To establish its case, the prosecution paraded three witnesses: **MKAMI ANTHONY** (PW1), **CHACHA WAMBURA** (PW2) and **AMBROSE WILLIAM** (PW3). Also, the prosecution produced two documentary exhibits namely: a sketch map of the scene of crime (Exhibit P1) and Report on post mortem examination of the deceased person (Exhibit P2).

Briefly, the deceased's mother who testified as PW1, told the trial court that the appellant was her co-wife and on the fateful day, they went together to the well to fetch water accompanied by the deceased. Then, while PW1 remained behind washing her clothes, the appellant disembarked heading home together with the deceased. On her way back home, PW1 found her daughter dead in a pit with hands tied behind. She raised alarm, then PW2 and PW3 the in-laws, were among those who gathered at the scene of crime. PW2 and PW3 apprehended the appellant and the matter was reported to the police. Apart from not seeing the appellant murdering the deceased, she suspected her to be the assailant because being co-wives; they always fought over their husband. Besides, she told the trial court that, her first born son was strangled to death by the appellant.

It was the testimonial account of PW2 that while at his residence he saw PW1, the appellant and the deceased going to the well. Later, he saw the appellant carrying a bucket heading home accompanied by the deceased. About 10 minutes later, he heard PW1 crying, rushed at the scene of crime together with PW3 and found the deceased in a pit. They apprehended the appellant who was carrying her child heading to her parent's home and she resisted to return home. None of them testified to have either seen PW1 coming back from the well or the appellant killing the deceased. They all suspected her because of what PW1 narrated to them on what had transpired at the scene of crime.

On her part the appellant denied to have killed the deceased. She testified that, on the fateful day she was unwell, remained at home sleeping and never went to the well. She told the trial court that, it is PW1 who went to the well accompanied by the deceased and later returned home crying lamenting that the deceased died after falling in a pit. She added that, the case was fabricated against her because being a second wife; the family members rejected her and always suspected her to be the cause for whatever episode.

In her judgment, the trial court convicted the appellant on the basis of circumstantial evidence which she found to irresistibly point to the guilty of the appellant.

The appellant through the services of Mr. Constantine Mutalemwa challenges that finding in this Court. The learned counsel has filed a memorandum of appeal comprising two grounds; namely:-

1. That, the trial was a nullity on account that the charge of murder was not read over and explained to the appellant and no plea was taken to that effect.
2. That the trial was tainted with procedural irregularity as the assessor cross examined the witnesses.

Following a brief dialogue with the Court which entailed going through the original case file, Mr. Mutalemwa dropped the first ground of appeal. Elaborating on the remaining ground, he submitted that, the assessors were not impartial during the trial having cross examined the witnesses. Mr. Mutalemwa argued this to be a fundamental irregularity which vitiated the trial rendering it a nullity. To support his proposition, he relied on the case of **TIMOTH S/O SANGA AND JOSEPH S/O SANGA VS REPUBLIC,** Criminal Appeal No. 80 of 2015 (unreported). In the

circumstances, Mr. Mutalemwa urged us to invoke our revisional jurisdiction, to nullify the trial, quash the conviction, set aside the sentence and order a retrial.

However, on probing by the Court, Mr. Mutalemwa was of the view that a retrial is not worthy due to the insufficient evidence on record to prove the guilt of the appellant. In addition he argued that, the trial judge did not consider the appellant's defence who apart from raising the defence of *alibi,* testified about the charge being fabricated against her since she was disliked by the family members including PW1. In this regard, Mr. Mutalemwa concluded that, apart from the appellant not being fairly tried, her defence riddled the prosecution case with doubts, rendering the charge not proved beyond reasonable doubt. In the premises, the learned counsel urged us to set the appellant free.

On the other hand, for the respondent Republic, Mr. Emmanuel Luvinga, learned Senior State Attorney conceded to the appeal. However, initially, he pressed for a retrial but after a brief dialogue with the Court in relation with the evidence on record, he submitted that, in the absence of water tight evidence, a retrial is not worthy.

Having considered the submission of learned counsel and the record before us, we have to determine if the trial was flawed with fundamental irregularities and the way foward.

Both counsel are at one that, at the trial the assessors cross examined witnesses. Going by the record, on 6/12/2013, three assessors were selected by the trial court to aid the High Court in the trial as mandatorily required under section 265 of the Criminal Procedure Act. This was not objected to by the appellant.

A close scrutiny of the record shows that, the three (3) assessors cross examined PW1 and PW3 and the appellant; two assessors cross examined PW2. As earlier stated, the role of assessors in a criminal trial before the High Court is to aid the court to arrive at a just decision. The manner in which assessors discharge their duty is clearly stated in section 177 of the Evidence Act [**CAP 6 RE.2002**] which provides:-

> *"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 light of the cited provision, assessor's duty to put any question to the witness is subject to permission of the presiding judge. Moreover, it

is not the duty of assessors to cross examine witnesses because the same is by law the domain of the parties to the case as provided under section 146 (1) (2) and (3) of the Evidence Act which states:-

> *"(1) The examination of a witness by the party who calis him is called his examination-in-chief.*
>
> *(2) The examination of a witness by the adverse party is called his cross-examination.*
>
> *(3) The examination of a witness, subsequent to the cross-examination, by the party who called him is called his re-examination".*

The order of examination of witnesses is regulated by section 147 of the Evidence Act. Under section 155 (a) and (c) of the Evidence Act, when a witness is subjected to cross examination, he may also be asked questions which tend to test, respectively, his veracity or to shake his/her credibility by injuring character. In this regard, we wish to repeat what we said in the case of **MAPUJI MTOGWASHINGE VS REPUBLIC;** Criminal Appeal No. 97 of 2015 (unreported) that:

> *"It is clear that the duty of assessors and the trial judge is to put questions to witnesses for clarification and not to cross-examine as the aim of cross-examination is basically to contradict, weaken*

or cast doubt upon the accuracy of the evidence by the witness during examination in chief".

Therefore, it is incumbent on the trial judge to properly direct assessors on their statutory role in terms of section 265 of the CPA so as not to stray into misdirection resulting into vitiation of such cases. 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".

[See also the cases of **CHRISANTUS MSINGI VS REPUBLIC,** Criminal Appeal No. 97 of 2015 (unreported) and **TIMOTH S/O SANGA AND JOSEPH S/O SANGA VS REPUBLIC** (supra)].

In view of the settled position of the law, in the present matter the cross examination of witnesses by the assessors violated a 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. (See **BARAKA JAIL MWANDEMBO VS REPUBLIC,** Consolidated Criminal Appeal No. 102 and 103 of 2014 (unreported).

We also agree with the learned counsel that, the appellant's defence was not considered by the trial judge. In the case of **HUSSEIN IDDI AND ANOTHER VS REPUBLIC TLR (1986) 166**, the Court dealt with an appeal whereby the trial court dealt with the prosecution evidence implicating the first appellant and reached the conclusion convicting the appellants without considering the defence evidence. Thus, the Court held:

> *"It was a serious misdirection on the part of the trial judge to deal with the prosecution evidence on its own and arrive at the conclusion that it was true and credible without considering the defence evidence".*

At the trial, the appellant testified to have been ill and never went to the well on the fateful day. Instead, added the appellant, it was PW1 who disembarked with the deceased heading to the well and later returned

home crying that, the deceased died after having fallen in the pit. In essence, the appellant was raising a defence of *alibi*. Notwithstanding that, on record the appellant never lodged any respective notice in terms of section 194; the trial judge was not exempt from the requirement to take into account the defence of *alibi*, which was not disclosed to the prosecution before the close of its case.[See the cases of **CHARLES SAMSON VS REPUBLIC** (1990) TLR 39 and **RASHID SEBA VS REPUBLIC,** Criminal Appeal No. 95 of 2005 (unreported]. Also, the appellant raised a complaint on the fabrication of the charges due to the existence of bad blood between her and family members including PW1. Apparently the appellant's evidence was not challenged by the prosecution and yet it was not considered by the trial judge.This omission was yet another fundamental irregularity which vitiated the trial because the appellant was not fairly tried.

Ordinarily we would have ordered the case to be tried afresh. However, we agree with the learned counsel that, looking at the doubtful evidence on record, in the interest of justice an order for a retrial is unworthy. We say so having revisited what led to the conviction of the

appellant, as reflected in the trial court's judgment at page 51 of the record of appeal whereby the High Court Judge made a following observation:

> *"Mindful of assessor's view, I am in complete agreement with prosecution side that, the evidence adduced by PW1, PW2 and PW3 is credible enough to ground a conviction of murder basing on circumstantial evidence..."*

We have deemed it pertinent to restate the basic principles governing reliability of circumstantial evidence to convict which include:-

i. That the circumstances from which an inference of guilty is sought to be drawn must be cogently and firmly established, and that those circumstances should be of a definite tendency unerringly pointing towards the guilty of the accused, and that the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and non else (See **JUSTINE JULIUS AND OTHERS VS REPUBLIC**, Criminal Appeal No. 155 of 2005 (unreported)).

ii. That the inculpatory facts are inconsistent with the innocence of the accused person and incapable of explanation upon any other reasonable hypothesis than that of guilt; and that before drawing inference of guilt from

circumstantial evidence, it is necessary to be sure that there are no ex-existing circumstances which would weaken or destroy the inference [See, **SIMON MSOKE VS REPUBLIC,** (1958) EA 715A and **JOHN MAGULA NDONGO VS REPUBLIC,** Criminal Appeal No. 18 of 2004 (unreported)].

iii. That each link in the chain must be carefully tested and, if in the end, it does not lead to irresistible conclusion of the accused's guilt, the whole chain must be rejected [see **SAMSON DANIEL VS REPUBLIC,** (1934) E.A.C.A. 154].

iv. That the evidence must irresistibly point to the guilt of the accused to the exclusion of any other person. [See **SHABAN MPUNZU @ ELISHA MPUNZU VS REPUBLIC,** Criminal Appeal No 12 of 2002(unreported)]

v. That the circumstantial evidence under consideration must be that of surrounding circumstances which, by undesigned coincidence is capable of proving a proposition with the accuracy of mathematics. (See **JULIUS JUSTINE AND OTHERS VS REPUBLIC** (supra).

vi. That the facts from which an inference adverse to accused is sought must be proved beyond reasonable doubt and must be connected with the facts which inference is to be inferred. (See **ALLY BAKARI VS REPUBLIC** (1992) TLR, 10 and **ANETH KAPAZYA VS REPUBLIC,** Criminal Appeal No. 69 of 2012 (unreported).

Applying the said principles to the factual situation, there are existing circumstances which have weakened or destroyed the inference to the appellant thus breaking the chain link of the alleged circumstantial evidence due to: **One,** the unchallenged appellant's account that she never went to the well and that it is PW1 who went to the well together with the deceased and later returned home crying lamenting about the deceased having died after falling in the pit. **Two,** since the appellant never went to the well, this dents the credibility of PW2 and PW3 who claimed to have seen her to and from the well. But amazingly, none of them stated to have seen PW1 coming back from the well which leaves a lot to be desired. These circumstances, weakened and destroyed the inference of the appellant's guilt from the circumstantial evidence. [See, **SIMON MSOKE VS REPUBLIC** (supra) and **JOHN MAGULA NDONGO VS REPUBLIC,** (supra). As such, the trial judge ought to have treated the evidence of PW1 PW3 with great caution before drawing inference from the circumstantial evidence.

Moreover, since it is the appellant's account that apart from PW2 and PW3 other people had gathered at the scene crime, it was crucial for the investigator to give his testimonial account to clear the doubts. Notwithstanding that, he was listed as a prosecution witness during

committal the investigator was not paraded as a witness. While we are mindful of the fact that in terms of section 143 of the Evidence Act, no particular number of witnesses will be required for any proof of fact, we are of settled mind that, in the circumstances of the case it was crucial for the investigator also be called to testify at least on the appellant's arrest in connection with the capital offence of murder which is punishable by death. In the case of **AZIZ ABDALLA VS REPUBLIC**, [1991] TLR 71 this Court among other things held:

> *"the general and well known rules is that the prosecutor is under a prima facie duty to call those witnesses who, from their connection with the transaction in question, are able to testify on material facts. If such witnesses are within reach but are not called without sufficient reason being shown, the court may draw an inference adverse to the prosecution."*

We are of settled mind that, given the circumstances of this case, this is a fit case to draw an adverse inference against the prosecution for their failure to call the police investigator. This entitles the appellant to a benefit of doubt.

In view of the aforesaid, the trial was flawed by incurable occasioned by the cross-examination of the witnesses by the assessors and non consideration of the appellant's defence. As to the way forward, we accordingly exercise revision power under section 4 (3) of the Appellate Jurisdiction Act and quash all the proceedings, the conviction and set aside the sentence. We also order the immediate release of the appellant unless otherwise lawfully held for another cause.

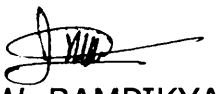
DATED at **MWANZA** this 23rd day of April, 2018.

K. M. MUSSA
JUSTICE OF APPEAL

S. E. A. MUGASHA
JUSTICE OF APPEAL

R. K. MKUYE
JUSTICE OF APPEAL

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



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