IN THE COURT OF APPEAL OF TANZANIA

AT DODOMA

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

CRIMINAL APPEAL NO. 164 OF 2017

SWALEHE MOHAMED ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Kalombola, J.)

dated the 24th day of May, 2017
in
Criminal Sessions Case No 92 of 2014

JUDGMENT OF THE COURT

6th & 12th March, 2018

MWAMBEGELE, J. A.:

The High Court of Tanzania sitting at Dodoma in Criminal Sessions Case No. 92 of 2014 found the appellant Swalehe Mohamed guilty of the offence of murder. He was convicted as charged and awarded the mandatory death sentence. Dissatisfied, the appellant has come to this Court complaining against both conviction and sentence.

At the hearing of the appeal before us on 06.03.2018, both parties were represented. While the appellant had the noble services of Rt. Rev. Kuwayawaya Stephen Kuwayawaya, learned advocate, the respondent Republic appeared through Ms. Chivanenda Tharsis Luwongo, learned State Attorney.

Before we went into the nitty gritty of the appeal, we prompted the trained minds for the parties to address us on the propriety or otherwise of what appears in the Record of Appeal, particularly at pp. 39, 40, 43, 44, 45, 46, 49, 60 and 61. At those pages, the assessors are indicated to have cross-examined the witness.

Rt. Rev. Kuwayawaya and Ms. Luwongo were at one that it was inappropriate for the assessors to cross–examine witnesses because that is within the province of an adverse party; a party who did not call the witness to testify. In the premises, they urged us to invoke the revisional powers conferred upon us by section 4 (2) of the Appellate Jurisdiction Act, Cap. 141 of the Revised Edition, 2002 (hereinafter referred to as the AJA) to nullify the proceedings, quash the conviction, set aside the sentence and order a retrial before another judge and a new set of assessors.

The question that this judgment must answer is whether it was proper for the assessors to cross-examine witnesses. As good luck would have it, this is not a virgin territory; it has been traversed by the Court before in a string of decisions. These cases include **James @ Shadrack Mkungilwa v. Republic**, Criminal Appeal No. 214 of 2010, **Majuli Longo & Another v. Republic**, Criminal Appeal No. 261 0F 2011, **Mapuji Mtogwashinge v. Republic**, Criminal Appeal No. 162 of 2015, **Geofrey Kisha v. Republic**, Criminal Appeal No. 69 of 2015, **Nathan Baguma @ Rushejela v. Republic**, Criminal Appeal No. 166 of 2015 (all unreported), to mention but a few.

We hasten the remark that we are in agreement with Rt. Rev. Kuwayawaya for the appellant and Ms. Luwongo for the respondent Republic that the ailment goes to the very root of a fair trial and vitiates the proceedings and its flanking judgment. We find it appropriate to start the determination of the million dollar question posed by discussing the law relating to examination of witnesses as provided for by the law.

Section 146 of the Evidence Act, Cap. 6 of the Revised Edition, 2002 (hereinafter referred to as the Evidence Act) stipulates:

"(1) The examination of a witness by the party who calls 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."

And section 177 of the same Act 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 terms of part II of the Evidence Act, particularly sections 146 and 147 read together with section 177 of the same Act, the examination and cross-examination of witnesses is the domain of the parties and not the assessors. What the assessors are supposed to do is provided for by section 177 of the Evidence Act quoted above; to put questions to witnesses when so permitted by the court.

And to sink the nail a little bit deeper, in the case of **Chrisantus Msingi v. Republic**, Criminal Appeal No. 97 of 2015 (unreported) this Court stated:

> *"... one would assume that, what was put to the witnesses were mere questions but in the form of cross-examination. We are aware that, assessor are allowed to put questions to the witnesses. However in the matter under scrutiny we are satisfied that, the assessor did cross examine the witnesses in form and substance which was geared to test the veracity and not to seek clarification of the testimony of witnesses. Since the role of assessor is to assist the judge in a fair trial it was incumbent on those assessors to exercise impartiality throughout the trial. However; by cross examining witnesses, the assessors acted beyond the purpose of the legislature which is to assist the judge in a fair trial. Assessors identified themselves with interested parties to the trial and it was not possible for any reasonable thinking person to view them as impartial. This*

eroded the integrity of justice which is an incurable irregularity ..."

[Quoted in **Godrey Kisha** (supra)].

In the case at hand the learned trial Judge indicated the examination-in-chief of witnesses as "XD" whereas the cross-examination and re-examination were, respectively, indicated as "XXD" and "RXD". Questions by assessors were also indicated as "XXD". It is apparent therefore that the learned trial Judge allowed the assessors to cross-examine the witnesses. This was patently wrong. The ailment vitiates the proceedings in that it rendered the trial of the appellant unfair. As we observed in **Nathan Baguma Rushejela** (supra):

"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."

We also note at p. 40 of the record of appeal that the court also cross-examined the witness. This is also inappropriate. In **Godfrey**

Kisha (supra) we recited the stance we took in **Mapuji Mtogwashinge v. Republic**, Criminal Appeal No. 162 of 2015 (unreported) in which we stressed on the need for the court, just like the assessors, not to cross-examine witnesses in the following terms:

> *"It is clear that the duty of assessors and the 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 given by the witness during examination in chief."*

In the light of the foregoing position of the law, the ailment apparent on the record of appeal is fatal. The proceedings and the consequent judgment were therefore a nullity.

We wish to remark here that we are aware that generally a retrial is ordered in cases of this nature. We are equally alive to the principle established in **Fatehali Manji v. Republic** [1966] 1 EA 343 in which, we quote from the headnote, it was held:

> *"in general a retrial will be ordered only when the original trial was illegal or*

defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its own facts and circumstances and an order for retrial should only be made where the interests of justice require it".

In the instant case, the appellant was charged with a capital offence of which he was convicted on 24.05.2017; just ten months ago. We think, in the circumstances of this case, justice will triumph if a retrial is ordered.

The above said, we invoke our revisional powers bestowed upon us by section 4 (2) of the AJA to quash the proceedings and judgment of the High Court. We also set aside the death sentence and order that the appellant be tried afresh before another judge and new set of

assessors. In the meanwhile, the appellant should remain under custody to await his retrial.

Order accordingly.

DATED at **DODOMA** this 10th day of March, 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 true copy of the original.

E.F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL