IN THE COURT OF APPEAL OF TANZANIA
AT MBEYA

(CORAM: MUGASHA, J.A., NDIKA, J.A., And SEHEL, J.A.)

CRIMINAL APPEAL NO. 490 OF 2016

DANKEN s/o DICKSON WANJALILE GWANG'OMBE.....APPELLANT
VERSUS
THE REPUBLIC..... RESPONDENT
(Appeal from the Judgment of the High Court of Tanzania at Mbeya)

(Karua, J.)

dated the 23rd day of September, 2013
in
Criminal Sessions Case No. 46 of 2012
.....

JUDGMENT OF THE COURT

26th & 30th August, 2019.

SEHEL, J.A.:

In the High Court of Tanzania at Mbeya sitting at Tukuyu in Rungwe District, the appellant Danken s/o Dickson Wanjalile Gwang'ombe was charged with the offence of murder contrary to section 196 of the Penal Code Cap. 16 RE 2002 (the Code). It was the case for the Republic that on 5th day of May, 2011 at Njisi village within the District of Kyela and Mbeya Region murdered one Isaya s/o Nyondo (the deceased). He pleaded not guilty to the charge. Thus a full trial ensued.

To prove his guilty, the respondent Republic paraded a total of five witnesses namely; **John Elia** (PW1) Kilambo hamlet chairman, **Edson Nyondo** (PW2) the father of the deceased, **Doris Kabonga** (PW3), **Hidaya Nyondo** (PW4) a sister of the deceased, and **F. 1470 Cpl. Adonick** (PW5) an investigation officer. The oral testimonies of the prosecution witnesses were supplemented by two exhibits that is, a post mortem examination report and a sketch map, exhibits P1 and P2 respectively.

The background facts of the case can briefly be stated as follows: on 5th May, 2011 at around 08.00 pm, PW2 returned home from his errands and received bad news from his wife, Asha Ngonya that his son Isaya (the deceased) was missing. He was further informed that the appellant had sent Alberto to pick up the deceased for casual work, brick picking. Upon receipt of the news, he decided to trace the deceased. His first stop was at Alberto who informed him that the appellant left together with deceased and they went towards old Kasumulu border direction. From there, PW2 went to Waziri's house where the appellant resides. PW2 informed the appellant his purpose of visit. According to PW2, the appellant appeared to be worried, he could not instantly reply on the whereabouts of the deceased so he had to ask him again and that is when he conceded to have been in a company with

the deceased but said they parted ways. He therefore did not know the whereabouts of the deceased.

The disappearance of the deceased was also reported to the Kilambo hamlet chairman, PW1 who upon receipt of the information, gathered youths and mounted search. In their search they came across PW3 who informed them that she saw the deceased with the appellant.

It was the account of PW3 that on 5th May, 2011 while she was outside her father's home cooking and saw the appellant in company with the deceased walking towards the forest, up the hill which is on the way to Kasumulu border. She said after thirty minutes, the appellant returned from the hill alone and he was walking very fast, as if he was being chased. It was her evidence that she knew the appellant very well as they lived in the same village, and he was a power tiller driver. On that day, she said the deceased had put on a coffee colour shirt and a black trouser. She also said she knew the deceased, a boy of 13 years old living in the same village.

PW1 decided to call the police. He called PW5. PW5 joined the searching team. In their search on the way at a culvert, they came across the deceased's shirt that was identified by PW2 and PW3 and the body of the

deceased was found on top of the hill. PW5 took the body to the hospital. The cause of death of the deceased, according to the post mortem report, exhibit P1 was due to suffocation, secondary to fracture of the neck.

PW4 essentially stated that on that day, she was at school and at about 10.00 a.m the appellant came to her school and told her that she was needed at home. She had to leave school. She left together with the appellant. On their way, the appellant requested to meet him later at Joseph's milling mill and then left her alone. At home she did not find anybody thus she went back to school where she stayed up to 2.00p.m. On her way back home, she met the appellant again. He asked her to follow him but she ignored him that is when he threatened to harm her by any means.

The appellant in his defence, denied to have killed the deceased. His story was that on that day he sent Alberto to call the deceased. The two boys wanted to go fishing so he decided to join them. However, on the way, he changed his mind and they parted ways. He denied passing by PW3's house.

After a full trial, the learned trial judge was convinced beyond doubt that the appellant killed the deceased but with no malice aforethought thus

convicted him to the charge of manslaughter and sentenced him to life imprisonment.

The appellant filed a memorandum of appeal containing six grounds and later on his learned advocate, Mr. James Berdon Kyando, filed a supplementary memorandum of appeal raising four grounds:

1. That the honourable trial Judge erred to convict and sentence the appellant by relying on circumstantial evidence which by its nature required corroboration.

2. That the honourable trial Judge erred to convict and sentence the appellant on a mere suspicion as the case against the appellant was not proven beyond reasonable doubt.

3. That the honourable trial Judge erred in law and fact to convict and sentence the appellant without considering part of his defence.

4. That the honourable trial Judge erred in law and facts to allow the assessors assume the role of cross examining the witnesses.

At the hearing of the appeal, the appellant was represented by Mr. Kyando, learned advocate. The respondent Republic was represented by Ofmedy Mtenga and Zena James, learned State Attorneys.

Mr. Kyando informed the Court that he is abandoning the memorandum of appeal lodged by the appellant on 8th January, 2019 and he will only argue the grounds raised in the supplementary memorandum of appeal.

Before he proceeded any further with his submission, we asked Mr. Kyando to address us on the fourth ground of appeal concerning the role of assessors at the trial.

Mr. Kyando argued that the assessors instead of assuming their role of aiding the trial they took part in the conduct of the trial by cross-examining the witnesses thus exceeded their statutory mandate. He referred us to pages 11, 15, 18, 19, 21, 22, 23 and 26 of the record where the record shows that after the witnesses were led in examination-in-chief, cross-examination was done by the adverse party, then the assessors were allowed to ask questions and lastly, the re-examination was done. It was his submission that the procedure adopted by the learned trial judge was contrary to sections 146 and 147 of the Evidence Act, Cap. 6 RE 2002 (the Evidence Act). He contended that looking at the questions posed by the assessors they were geared at either testing the veracity of the witnesses or shaking the evidence of the witnesses as such the assessors were not

impartial. He cited the cases of **Chrisantus Msingi v. Republic**, Criminal Appeal No. 97 of 2015 and **Malambi s/o Lukwaja v. Republic**, Criminal Appeal No. 70 of 2015 (both unreported). When asked to comment as to whether the assessors gave any opinion in respect of the offence of manslaughter, Mr. Kyando responded that the verdict of the manslaughter was not backed up by the assessors' opinions and in any event they were not addressed on it. In totality he said the trial was conducted without the aid of assessors thus it was a nullity. On the way forward, he submitted that since the case was purely based on circumstantial evidence then according to the circumstances of the case, it is not a fit case to order a retrial.

Ms. James wholly concurred with her learned friend Mr. Kyando that the trial was marred with irregularities since the assessors took part in the conduct of the trial by cross-examining the witnesses and that the trial judge did not give reasons why he differed with the opinions of the assessors who returned verdict of guilty to the charge of murder to which they were addressed upon. She submitted that all these irregularities implied that the trial was conducted without the aid of assessors she therefore prayed for the nullification of the whole proceedings, setting aside the conviction and

sentence and for the interest of justice an order of retrial be made. She referred us to the case of **Fatehali Manji v. Republic** [1966] EA 343.

In rejoinder, Mr. Kyando relying on the same case of **Fatehali Manji v. Republic** insisted there should be no order for retrial.

On our part, we entirely agree with the two learned counsel that during the trial the assessors were allowed to cross-examine the witnesses for both the prosecution and the defence. They did put questions to the witnesses immediately after the adverse party had cross-examined them and thereafter followed the re-examination. This procedure is manifestly wrong because assessors sit in the trial High Court for the sole purpose of aiding the trial judge. Section 265 of the CPA 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."*

In the case of **Abdallah Bazamiye & Others v. Republic** [1990] TLR 42 it was held:

> ***"The assessors' duty is to aid the trial judge in accordance with section 265, and to do this they may put their 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 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 added]*

We fully subscribe to that position that assessors' role is to ask questions in terms of the provisions of section 177 of the Evidence Act. At what stage they can ask their questions, in **Mathayo Mwalimu Masai Rengwa v. Republic**, Criminal Appeal No. 147 of 2008 (unreported) we said:

"...As at what stage in the trial can assessors ask questions, we think that this depends on the trial judge. In our respectful opinion, however, ***we think that assessors can safely ask questions after the re-examination of a witness."***

Further, sections 146 and 147 (1) of the Evidence Act prescribe the order and directions of examination. Section 146 provides:

> *"(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."*

Section 147 (1) reads:

> *" (1) Witnesses shall be first examined-in-chief, then (if the adverse party so desires) cross-examined, then (if the party calling them so desires) re-examined.*

From the above, it follows then that the order of examining the witness starts with the examination-in-chief by the party calling the witness, then that witness is cross-examined by the opposite party, and finally the same witness is re-examined by the party who called him/her. The law espoused in sections 146 and 147 of the Evidence Act does not expect any reversal of the sequential orderliness. See **Ajili Ajili v. Republic** (supra)).

The object of cross-examination is set out under section 155 of the Evidence Act that:

> *"When a witness is cross-examined, he may, in addition to the questions hereinbefore referred to/ be asked any questions which tend*
>
> *(a) To test his veracity;*
>
> *(b) To discover who he is and what is his position in life; or*
>
> *(c) To shake his credit by injuring his character, although the answer to such questions might tend directly or indirectly to incriminate him/ or might expose or tend directly or indirectly to expose him to a penalty or forfeiture."*

Obviously, by virtue of their role, assessors are not expected to assume the function of contradicting a witness in a case. Assessors are required to be impartial and should not take sides during the trial. We emphasised this position in **Chrisantus Msingi v. Republic** (supra) when we said:

"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."

In the present appeal, the assessors assumed the role of adverse party instead of aiding the trial judge they took the function of contradicting the witnesses. That irregularity appears at pages 11, 15, 18, 19, 21, 22, 23, and 26 of the record. For instance at page 11 after PW1 was cross-examined by the learned counsel for the defence, he was cross-examined by the three assessors then lastly, he was re-examined by the State Attorney.

Also at page 15, PW2 was cross-examined by the assessors after the cross-examination of the defence counsel and thereafter he was re-examined by the prosecution side. Thereafter, followed questions from the 2nd and 3rd assessors and then re-examination. The same pattern of sequence was applied to all other witnesses. It is thus clear that the assessors took part in

the conduct of the trial as parties to the case and not as assessors. They did not take their role as assessors.

The active role taken by the assessors as parties to the case not only eroded the integrity of the criminal justice system but also distorted the whole aim of the conduct of the trial with the aid of assessors thus constituted a mistrial. We say they took active role because even the questions put to the witnesses were aimed at testing the veracity of the witness, for instance at page 11 when PW1 was asked a question put to him by the 2nd assessor, he replied: *"I did not have the opportunity to interrogate the accused because he was in the police hands."* Also at page 15 when PW2 responded to a question to put to him by the 1st assessor that: *"I could see him we were so close."* From the content of the answers it is clear that the aim was not to seek clarification from the witness. This is also a serious irregularity that vitiated the whole proceedings at the trial court.

Another glaring irregularity in the proceedings is the failure by the trial judge to give reasons for his departure from the assessor's opinion. The appellant herein was charged with the offence of murder contrary to section 196 of the Penal code. At pages 27 to 29 of the record the assessors were properly addressed on the ingredients establishing the offence of murder.

There was no direction on the charge of manslaughter. At page 30 of the record all the three assessors opined to the effect that the appellant was guilty. Although at page 40 the trial judge expressed that he concurred with the assessors' opinion but at the end he returned a verdict of guilty to the offence of manslaughter contrary to section 195 of the Penal Code. He did not give reasons as to why he differed with the assessors' opinion. We are fully aware that the trial judge is not bound by the opinion of assessors, but where the judge differs with the unanimous views of his assessors, it is good practice to state reasons in his judgment for his disagreement; especially if assessors have given grounds for their opinions. (See **Hamis Mdushi v. Republic**, Criminal Appeal No. 161 of 2015 (unreported)). Failure to give reasons amounts to miscarriage of justice on part of the appellant thus vitiates the trial.

As shown above the whole trial was flawed by incurable irregularities occasioned by the assessors cross-examining the witnesses and failure to give reason by the trial judge as to why he differed with assessors' opinion. As to way forward, we quash all the proceedings, conviction and set aside the sentence. We, however, agree with the learned State Attorney that according to the circumstances of this case, the interest of justice calls for

the retrial of the case. We thus order for the expedited retrial of the appellant before another judge with different set of assessors. Meanwhile, the appellant shall remain in custody while awaiting for the commencement of retrial.

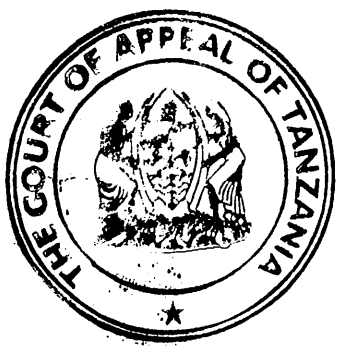
DATED at **MBEYA** this 30th day of August, 2019.

S. E. A. MUGASHA
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

The Judgment delivered this 30th day of August, 2019 in the presence of Ms. Xaveria Makombe and Zena James both learned State Attorneys for the respondent Republic and Mr. Gerald Msegeya holding brief for Mr. James Berdon Kyando, learned advocate for the appellant is hereby certified as a true copy of the original.



B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL