IN THE COURT OF APPEAL OF TANZANIA
AT TABORA

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

CRIMINAL APPEAL NO. 112 OF 2016

IDRISA HAMIMU @ MWELA ....APPELLANT

VERSUS

THE REPUBLIC ....RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Tabora).

(Matogolo, J.)

dated the 4th day of November, 2014
in
Criminal Session Case No. 96 of 2013

JUDGMENT OF THE COURT

25th & 30th October, 2019

LILA, J.A.:

The High Court of Tanzania sitting at Tabora sentenced Idrisa Hamimu @ Mwela (the appellant) to death upon being convicted of the offence of murder. It was alleged that on 22/3/2012 at about 10:00 hrs., at Mkongoro village within the District and Region of Kigoma, he murdered one Halima Ntibaluta. Dissatisfied, he preferred this appeal to the Court.

The appellant, initially, lodged a memorandum of appeal fronting four (4) grounds of complaints. Later on, Mr. Kamaliza Kamoga Kayaga, learned advocate, who was assigned the dock brief to represent him in this appeal, lodged another memorandum of appeal comprising of three grounds. However, at the hearing of the appeal, the learned advocate abandoned all the grounds of appeal lodged by the appellant as well as grounds 2 and 3 in the memorandum of appeal he lodged. He remained with only one ground of appeal which was couched thus:-

> *"1. That there was no fair trial to the appellant as the Honourable Trial Judge wrongly allowed assessors to cross-examine witnesses."*

A brief account of what transpired at the trial court is simple. The appellant was accused of killing his step mother. In their bid to establish so, the prosecution marshalled four witnesses. Out of them, two were eyewitnesses to the incident. These are Halima Ismail (PW1) and Hawa Nyamleha (PW2), the latter being the deceased co-wife. The appellant's late father had three wives, the appellant's mother being the senior one. According to them (PW1 and PW2), on the material date and time, were

together with the deceased outside the accused house conversing. Then PW2 went into her house which was close to the appellant's house. A short time later the appellant arrived thereat, picked a hoe and threatened to cut the two who remained outside the appellant's house, that is the deceased and PW1. So as avoid the onslaught, the two dispersed and the appellant advanced to the deceased who had fallen down and cut her with the hoe on the head, shoulder and hand. The deceased screamed for help which attracted the attention of PW2 who on getting outside her house, she saw the appellant cutting the deceased with the hoe. The attempt to rescue the deceased was unsuccessful as the appellant advanced to them threatening to cut them. Hamisi Sadick, one of the neighbours, also responded to the call but found the deceased helplessly lying on a nearby beans field. The deceased was taken to hospital and the appellant was thereby arrested. A policeman, one F. 8898 D/C Devis Emanuel, visited the scene of crime where he recorded the witness statements and drew the sketch map.

On his part, the appellant completely disassociated himself with the commission of the offence. He said it was PW2 who cut the deceased with the hoe when she aimed at him so as to assist the deceased after the

deceased had grabbed him by his neck and was struggling to be released. He said the struggle ensued after he had asked the deceased why she had entered into his house and taken his TZS 15,000/= without his permission.

The trial High Court was satisfied that the charge was proved against the appellant. It accordingly convicted and sentenced him to suffer death by hanging.

At the hearing of the appeal, as stated above, the appellant was present and was represented by Mr. Kamaliza Kamoga Kayaga, learned advocate, whereas the respondent Republic had the services of Ms Mercy Ngowi, learned State Attorney.

Submitting in respect of the sole ground of appeal, Mr. Kayaga strongly argued that the appellant was not fairly tried in that the High Court Judge wrongly allowed the assessors to cross-examine the witnesses instead of putting question seeking clarification on matters they had testified. Elaborating, he said the questions put to the witnesses including the appellant were intended to challenge their testimonies and by doing so the assessors had abrogated their legal duty of being impartial. To substantiate his assertions, he referred us to pages 43-44,

45-46, 48 and 50 where it is shown that PW1, PW2, PW3 and PW4 were cross-examined by assessors, respectively. He added that even the appellant was cross-examined by the assessors as reflected at pages 57 and 58 of the record of appeal.

As a proof that the witnesses were cross-examined, Mr. Kayaga made reference to responses given by the witnesses which clearly revealed that the questions asked by assessors were intended to challenge or contradict them. He went further to pin point the pages in the record of appeal of which showed by the prefix "XXD" that the assessors cross-examined the witnesses to be pages 57 and 58 where the appellant was cross-examined, page 44 where PW1 was cross-examined, page 46 where PW2 was cross-examined, page 48 where PW3 was cross-examined and page 50 where PW4 was cross-examined. He added that the responses by the witnesses were implicit that they were asked questions aimed at contradicting their testimony. He submitted that such instances are reflected at pages 44, 46, 57 and 58 of the record of appeal.

In view of the above, Mr. Kayaga submitted that the assessors assumed the role of the adversary parties hence they were not impartial. Citing the Court's decision in the case of **Kulwa Makomelo And Two**

Others vs Republic, Criminal Appeal No. 15 of 2014 (unreported), he argued that the trial was not fair rendering the proceedings and judgment are a nullity.

Regarding the way forward, Mr. Kayaga, urged the Court to order a re-trial due to the fact that the offence with which the appellant was charged is a serious one hence it will be in the interest of justice that a retrial order is made.

Ms Ngowi, on her part, supported the appeal. She fully went along with Mr. Kayaga's argument that the learned trial Judge wrongly permitted the assessors to cross-examine the witnesses instead of putting questions as stipulated in section 177 of the Criminal Procedure Act, Cap. 20. R. E. 2002 (the CPA). Relying on the case of **Kulwa Makomelo vs. Republic** (supra) and the case of **Francis Alex vs Republic**, Criminal Appeal No. 374 of 2013 (unreported), she argued that the entire trial was a nullity. She, again, was in all fours with Mr. Kayaga that this is a fit case to order a re-trial.

Upon our examination of the submissions of counsel from either side, we find that the fundamental decisive issue is whether in the light of

the trial High Court's proceedings, the assessors were allowed to cross-examine the witnesses instead of putting up questions which seek clarification for a point from the witnesses not well understood?

We are settled in our minds that in terms of the provisions of section 265 of the CPA, all trials before the High Court must be with the aid of assessors. Consequently, assessors are minded to aid the court in the fair administration of justice. They become part of the court. They are therefore expected be impartial. Their prime duty in the due course of conducting the trial is well spelt under section 177 of the Tanzania Evidence Act, Cap. 6 R. E. 2002 (the TEA) is to put up questions to witnesses. That section states:-

> *"177. In cases tried with the aid of assessors, the assessors may put any questions to the witnesses, through or by leave of the Judge, which the judge himself might put and which he considers proper."*

It can certainly be discerned from the above provision that their duty is not to cross-examine witnesses. More so, in terms of the provisions of

section 146 of TEA cross-examination is the exclusive domain of the adverse party. That section provides:-

> *"146(1). The examination of a witness by the party who calls him shall be called his examination –in-chief.*
>
> *(2) The examination of a witness by the adverse party shall be called his cross-examination.*
>
> *(3) The examination of a witness, subsequent to the cross-examination by the party who called him, shall be called his re-examination."*

As a way of harmonizing the provisions of sections 146 and 177 of TEA, the Court, in the case of **Mapuji Mtogwashinge vs Republic**, Criminal Appeal No. 162 of 2015 (unreported) had this to say:-

> *"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 another case of **Abdallah Bazamiye and Another vs Republic**, [1990] T.L.R 42, the Court emphasized that position irrespective of whether a witness cross-examined is of the prosecution or the accused himself and reminded the trial Judges of their duty to control and give guidance to the assessors on the kind and nature of questions to ask the witnesses thus:-

> ***"It is not the duty of assessors to cross-examine or re-examine witnesses or the accused.*** *The assessor's 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... That the discretion remains with the Judge to prevent them asking questions which are, for example patently irrelevant, biased, perverse, or otherwise improper."* (Emphasis added)

[See also **Mathayo Mwalimu and Another vs Republic**, Criminal Appeal No. 174 of 2008 and **Godlove Azael @ Mbise vs Republic**, Criminal Appeal No. 312 of 2007 (both unreported)]

The above legal position is also consistent with the provisions of section 290 of the CPA which provides that:-

> *"290. The witnesses called for the prosecution shall be subject to cross-examination by the accused person or his advocate and to re-examination by the advocate or the prosecution."*

In the event the assessors abrogate their mandate to put questions to the witnesses and instead they cross-examine them, the Court has consistently held that irregularity to be fatal and incurable because it offends the rule against bias which is a long rooted principle in the administration of justice. Failure to exercise impartiality results in an unfair trial as was restated by the Court in the case of **Kulwa Makomelo and Two Others vs Republic** and **Francis Alex vs Republic** (supra) rightly cited by counsel of the parties. In the former case, the court stated that:-

> *"...By allowing assessors to cross-examine witnesses the court allowed itself to be identified with the interests of the adverse party and, therefore, ceased to be impartial. By being partial, the court breached the principle of fair trial now entrenched in*

the Constitution. With respect this breach is incurable under section 388 of the Criminal Procedure Act."

The only remedy available in such situations is that the entire trial proceedings including a judgment are rendered a nullity (see **Mage Kalamu and Another vs Republic**, Criminal Appeal No. 14 of 2012, **Baraka Jail Mwandembo vs Republic**, Criminal Appeal No. 97 of 2014, **Chrisantus Msingi vs Republic**, Criminal Appeal No. 97 of 2015 (all unreported).

Having in mind the above unimpeachable propositions of the law applicable in the circumstances of the instant case, we now proceed to determine the issue before us.

In the first place it is easily discernible from the record of appeal that all the answers by the prosecution witnesses and the appellant in response to questions posed by assessors were preceded by an abbreviation "**XXD**". The Court had an occasion, in the case of **Akimu Mselemu Mwakalinga and Another vs Republic**, Criminal Appeal No. 101 of 2014 (unreported), to expound what those prefixes connote and it categorically stated that:-

*"As it turns out, the shortcoming is easily discernible from the record of proceedings since the assessor's questions, with respect to all witnesses, were preceded with the prefix: "**XXD**". It is common ground that the prefix is an abbreviation for the term: "**cross-examination"** and, thus, it is beyond question that the learned Judge, indeed, allowed the assessors to cross-examine the witnesses."*

We have, indeed, read the specific areas pin pointed by Mr. Kayaga and we entirely subscribe to the submissions of counsel from either side. The responses by the witnesses tend to clearly show that the assessors cross-examined the witnesses. Besides the responses being preceded by the prefix "XXD", seriously examined, they clearly tend to suggest that the questions put to the witnesses were directed towards contradicting what they had told during examination-in-chief. That can be deduced from the witnesses' defensive responses. To illustrate that, we wish to reproduce just part of the witnesses' responses as reflected in the proceedings.

At pages 57 and 58 when the appellant was cross-examined by the 1st assessor one Donald Gwera, he said;

> *"It is not true that I was assaulted because I injured Halima Ntibaluta."*

At page 58, the appellant said:-

> *"There is no any property left by my father which my step-mother took, Halima used to hate me that is why she used t enter inside my house and take my property. I ended at STD VII there was no money to educate. Hamisi in his statement did not say that he saw me with a hoe. I have no grudges with him."*

At page 44 when PW1 was cross-examined by 3rd assessor one Konrad Mudyanko, he said:-

> *"I knew the accused person before, he is of unsound mind."*

At page 46 when PW2 was cross-examined by 3rd assessor, he said:-

> *"I do not know where accused get the hoe. I just see him with a hoe. The accused had no grudges with the deceased; the accused is of unsound mind for the whole period I know him."*

This is a clear manifestation that the assessors overstepped their mandate. They took side with the adverse party which is a violation of their duty as stipulated under sections 265 of the CPA and 177 of TEA.

In the end, we are inclined to agree with the learned counsel for both sides that by assuming the function of contradicting the witnesses, the assessors abrogated their duty to aid the court in a fair dispensation of justice. They undermined the conduct of a fair trial. On the authorities cited above, such conduct vitiated the entire proceedings and the judgment. The whole trial was therefore a nullity.

As regards the way forward, we are again in agreement with both learned counsel that the offence charged was a serious one and for the interest of justice, an order of retrial is a proper course to take.

However, before we conclude, we think, as a guide to trial Judges we should make an observation on a certain anomaly we have noted in the record of appeal. That is, the assessors cross-examined the witnesses after they were re-examined by the party who called them. Having already held that it was legally improper for the assessors to cross-examine the

witnesses, we think also that it was improper for the assessors to assume their duty to put questions before the re-examination. A trial Judge and assessors are advised to ask questions after the re-examination. We find that guidance from our decision in the case of **Mathayo Mwalimu and Another** (supra) where the court observed that:-

> *"As at what stage in the trial can assessors ask questions, we think that this depends on the trial Judge. In our respective opinion, however,* ***we think that assessors can safely ask questions after the re-examination."*** (Emphasis added)

The above legal position is based on the fact that it is after the re-examination that the assessors would be able to know which areas in the witnesses' testimonies are not clear hence ask questions seeking elaborations and clarifications.

All said, the appeal is allowed. The appellant's conviction is quashed and the consequent sentence is set aside. We hereby order a retrial of the appellant before another Judge with a new set of assessors. And, given the long time the appellant has spent in prison, we direct that the retrial be immediately commenced by the Director of Public Prosecutions and the

court should expedite the trial. In the meantime, the appellant is to remain in remand custody.

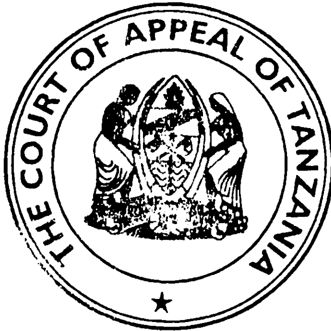
DATED at **TABORA** this 29th day of October, 2019.

S. E. A. MUGASHA
JUSTICE OF APPEAL

S. A. LILA
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

The Judgment delivered this 30th day of October, 2019 in the presence of Mr. Kamaliza Kamoga Kayaga, Counsel for the Appellant and Mr. Miraji Kajiru, Senior State Attorney for the respondent/Republic is hereby certified as a true copy of the original.



B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL