IN THE COURT OF APPEAL OF TANZANIA
AT IRINGA

CRIMINAL APPEAL NO. 237 OF 2016

(CORAM: MUSSA, J.A., LILA, J.A., And WAMBALI, J.A.)

JOSEPH BALAMI @ PANGA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Shangali, J.)

Dated the 8th day of April, 2016

in

Criminal Session Case No. 25/2012

JUDGMENT OF THE COURT

8th & 13th May 2019

MUSSA, JA.:

In the High Court of Tanzania, at Iringa Registry, the appellant was arraigned for murder, contrary to section 196 of the Penal Code, Chapter 16 of the Laws. The particulars on the information alleged that, on or about the 15th day of October 2011, at Kidamali Village, within Iringa Rural District, the appellant murdered a certain Stani Singaile whom we shall henceforth refer to as "the deceased."

The appellant refuted the accusation, whereupon the prosecution featured five witnesses, five documentary exhibits and a bush knife to establish its claim. On his part, the appellant testified on oath and featured, on the witness box, his wife, namely, Sophia Simon (DW2) in support of his denial of the prosecution case. At the height of the trial, the presiding Judge (Shangali, J.) was satisfied that the case for the prosecution was established to the hilt and, in the result, the appellant was found guilty, convicted and handed down the mandatory death sentence. He was aggrieved by both the conviction and sentence hence the appeal at hand.

For a reason that will shortly become apparent, we need not give a full account of the background giving rise to the appellant's apprehension, arraignment and his ultimate conviction. It will suffice if we summarily recapitulate the factual setting as follows:-

The alleged occurrence took place at a local brew pub which is situate at Kidamali Village, around 7.00 p.m. or so, on the fateful day. The deceased, along with several other villagers, were at the pub consuming local brew known as *msabe*. Amongst those present

at the pub, was Kulwa Burton Chengula (PW1) who, upon arrival at the pub, she was invited by the deceased and took a seat abreast him. Her testimony was to the effect that the pub was, at the material time, brightly illuminated by an electric tube light. Soon after, the appellant entered the pub and walked straight to where the deceased and PW1 were seated and, having reached there, he straight away drew out a knife whereupon, he, without a word, stabbed the deceased on the left side of his abdomen. Thereafter, the appellant clicked his heels and ran clear of the scene. The deceased, who was seriously injured died moments later within the precincts of the pub. On the morrow of the occurrence, a medical officer conducted a post mortem examination on the body of the deceased and revealed that the deceased's death resulted from hemorrhagic shock secondary to excessive bleeding (exhibit P1).

There was further prosecution evidence to the effect that the appellant was pursued by villagers and apprehended a while later on the same day of the occurrence. It was further said that upon being interviewed, he allegedly confessed involvement in a

cautioned statement which was recorded by detective corporal No. 7786, namely, Laurence (PW2); just as he also allegedly confessed involvement in an extra-judicial statement recorded by a justice of the peace, namely, Aloyce Masua (PW3).

Nonetheless, as we have hinted upon, in his sworn testimony, the appellant denied involvement in the alleged occurrence although he did not quite refute the prosecution detail about attending the pub on the fateful day. He did not, as well, refute the prosecution allegation that the pub was clearly lit by electricity light.

As we have, again, already intimated, on the whole of the evidence, the learned presiding Judge convicted the appellant and sentenced him to the extent we have already indicated. His appeal to this Court is upon a memorandum of appeal which is comprised of five grounds, namely:-

> "*1. That the Trial Judge erred in law and facts by delivering judgment emanating from unprocedural trial on account that the Court Assessors were allowed to cross-examine the witnesses.*

2. *That, the Trial Judge erred in law and facts by failing to address the Assessors on critical issue of postmortem examination report.*

3. *That, the trial court erred in law and fact by allowing the prosecuting attorney to tender the postmortem examination report, exhibit P1 unprocedurally.*

4. *That, the Trial Judge erred in law and facts by allowing the tendering of exhibit P.3 without conducting trial within a trial after being objected to.*

5. *That the trial Judge erred in law and facts by convicting the appellant without specifying in the judgment the section of the Penal Code or other law under which the appellant was convicted."*

At the hearing before us, the appellant was represented by Mr. Samson Rutebuka, learned Advocate, whereas the respondent Republic had the services of Mr. Adolf Maganda, learned Senior State Attorney, who was being assisted by Ms. Edna Mwangulumba, learned State Attorney.

Mr. Rutebuka commenced his address to us by abandoning the second to fifth grounds of appeal and left the first ground as the sole ground of appeal. Expounding the sole ground of appeal, the learned counsel for the appellant faulted the learned trial Judge for allowing the assessors to cross-examine the witnesses instead of according them the opportunity of putting questions to the witnesses.

Mr. Rutebuka contended that the anomaly is palpably vivid at pages 18,19,24,27 and 33 of the record of appeal. Upon numerous decisions of the Court, he further said, the anomaly has been held to vitiate the entire proceedings of the trial court. To fortify the contention, the learned counsel for the appellant referred to us the unreported Criminal Appeal No. 126 of 2014 - **Yusuf Sylivester V. The Republic.** In the result, Mr. Rutebuka impressed upon us to nullify the trial proceedings and order a retrial upon the invocation of the Court's revisionary jurisdiction under section 4(2) of the Appellate Jurisdiction Act, Chapter 141 of the Laws (the AJA).

For his part, Mr. Maganda went along with the submissions of his adversary learned friend and similarly took the stance that the anomaly vitiates the entire proceedings of the trial court. He was, however, of the view that taking into consideration the seriousness of arraigned offence as well as the punishment tied to it, we should order a retrial.

We have carefully considered and weighed the concurrent submissions from both learned counsel and, for a start, we wish to preface our determination with an observation that the examination of witnesses is regulated by sections 146 and 147 of the Evidence Act, Chapter 6 of the Laws (the TEA). More particularly, section 146 goes thus:-

> *"(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."

For its part, section 147(1) of the TEA states:-

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

The established practice by trial courts has been to prefix **"the examination –in-chief"** of a witness by the letters **"XD";** whereas his **"cross–examination"** is prefixed by the letters **"XXD"** and his subsequent **"re–examination"** is prefixed by the letters **"RXD".**

As regards the role of the assessors section, 177 of the TEA is instructive:-

> *"In cases tried with assessors,* ***the assessors may put any question to the witness,*** *through or by leave of the Court, which the court itself might put and which it considers proper"*[Emphasis is supplied]

In the light of the foregoing exposition of the relevant provisions of the law, it is beyond question that the examination and cross-examination of witnesses is not the domain of the assessors. In, for instance, the unreported Criminal Appeal No. 15 of 2014 – **Kulwa Makomelo and Two Others V. The Republic** the Court frowned upon the practice of allowing the assessors to cross-examine witnesses in the following words:-

> *"The purpose of cross-examination is essentially to contradict. By the nature of their function, assessors in a criminal trial are not there to contradict. Assessors are there to aid the court in a fair dispensation of justice ... Where assessors cross-examine witnesses, they necessarily identify themselves with the interests of the adverse party and demonstrate bias which is a breach of one of the rules of natural justice, the rule against bias which is the cornerstone of the principles of fair trial now entrenched in article 13(6) (a) of the Constitution of the United Republic of Tanzania, 1977."*

Corresponding remarks were made in Criminal Appeal No. 162 of 2015 - **Mupuji Mtogwashinge v. the Republic;** and Criminal Appeal No. 97 of 2015 **Chrisantus Msingi V. The Republic** (both unreported).

In the matter at hand, the illustrative example of the assessors being allowed to cross examine is demonstrated at the referred pages 18,19,24,27 and 33 of record of the appeal where the assessors questioning was preceded with the prefix letters "**XXD**." Thus, having carefully perused the record, we are inclined to share the sentiments of counsel from either side to the effect that, quite unfortunately, the learned presiding Judge gave room to the assessors to cross-examine some prosecution witnesses. As has been held upon numerous decisions of this Court, the anomaly is fatally incurable and has the effect of vitiating the entire trial proceedings [see **Kulwa Makomelo** (supra)].

In the end result, we accede to the advice of invoking our powers of revision under section 4(2) of the AJA and, in fine, the entire trial proceedings are nullified with an order for a new trial to

be presided by another judge and a new set of assessors. The new trial should be commenced and conducted as expeditiously as possible and, in the meantime, the appellant should remain in custody.

DATED at **IRINGA** this 10th day of May, 2019.

K. M. MUSSA
JUSTICE OF APPEAL

S. A. LILA
JUSTICE OF APPEAL

F. L. K. WAMBALI
JUSTICE OF APPEAL

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

A.H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL