

**IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA**

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

CRIMINAL APPEAL NO. 409 OF 2017

GODFREY s/o WILLIAM @ MATIKO..... 1st APPELLANT
THOMAS s/o MWITA @ NYAGANCHA.....2nd APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

**(Appeal from the Decision of the High Court of Tanzania sitting
at Tarime)**

(De-Mello, J.)

Dated the 30th day of May, 2017

in

Criminal Session Case No. 116 of 2014

JUDGMENT OF THE COURT

9th & 17th February, 2021.

SEHEL, J.A.:

This appeal is against the conviction and death sentence meted to the appellants by the High Court of Tanzania sitting at Tarime (the trial court) in Criminal Session Case No. 116 of 2014. They were charged with the offence of murder contrary to sections 196 and 197 of the Penal Code, Cap. 16 R.E. 2002. It was alleged by the prosecution that on 23rd day of August 2012 at Nyinchoka Village, within Serengeti District in Mara Region the appellants did murder one, Simon s/o Nyansaho Mabogi. Upon a full

trial, they were convicted as charged and sentenced to suffer death by hanging.

For a reason which will shortly become apparent, we shall not present the background facts of the case giving rise to the present appeal. Suffice to state here that, the appellants having been aggrieved with the decision of the trial court, each lodged a notice of appeal followed by filing separate memorandum of appeal comprising of five (5) grounds. Further, on 21st January, 2012, after Mr. Cosmas Tuthuru, learned counsel was assigned the dock brief to represent the appellants lodged a joint memorandum of appeal comprised of four grounds, which reads:-

- 1. That, there were omission by a trial court to afford both the appellants an opportunity to express whether or not they objected to any of the assessors selected to participate in the trial and hence there were no fair trial to the appellants.*
- 2. That, there were omission by a trial court when it failed to explain to the assessors their duty before commencement of prosecution case and hence they failed to give their opinion according to the legal requirement.*
- 3. That, the first trial court erred in law and fact to convict the appellants relying on the cautioned statement of the 2nd*

appellant (Exhibit P1) which were irregularly tendered and admitted in evidence contrary to the law.

4. *That, the trial court erred in law and fact to convict the appellants relying on unfavourable identification conditions by the prosecution witness (PW3) one Chacha Nyamsoho Simeon Mabogi.*

When the appeal was called for hearing, Mr. Tuthuru, learned advocate appeared to represent both appellants, whereas Ms. Ghati William Mathayo, learned State Attorney, appeared for the respondent Republic.

Mr. Tuthuru, at the very outset, informed the Court that he had consulted his clients and agreed with them that he should abandon the two sets of memoranda of appeal filed by the appellants of which he did and he will focus his submission on the joint memorandum of appeal which he had earlier on filed. He also abandoned grounds number three and four. Elaborating on the two remaining grounds of appeals which he conjointly submitted, that the proceedings of the trial court were marred with procedural irregularities on the appointment and the role of assessors. He contended that the appellants were not accorded a chance to comment on the appointment of either or all of the assessors nor were the assessors

explained their role in the trial as the result they failed to perform their duty in line with the stipulation under section 298 (1) of the Criminal Procedure Act, Cap. 20 R.E 2019 (the CPA). On the basis of the pointed anomalies, it was the strong view of the learned counsel for the appellants that under the circumstances, there was no fair trial on part of the appellants nor could it be said that the trial was conducted with the aid of assessors as required by the provisions of section 265 of the CPA. He argued further that, under the circumstances and in the interest of justice, the anomalies vitiated the entire proceedings. He therefore urged the Court to declare the entire proceedings of the trial court a nullity, quash the conviction and set aside the death sentence meted to the appellants. In support of his argument, he referred us to the decisions of the Court in **Augustino s/o Nundi v. The Republic**, Criminal Appeal No. 388 of 2017 and **Florian Ijenje and 2 Others v. The Republic**, Criminal Appeal No. 461 of 2017 (both unreported). Although he acknowledged that ordinarily an order of retrial would be made but he beseeched us to acquit and release the appellants from the prison custody because he was of the view that the evidence available was insufficient to warrant a conviction to the appellants.

On her part in response, Ms. Mathayo supported the appeal by joining hands with the submission made by her learned friend. She added that even if the appellants were given a chance to comment on the selection of assessors, they could not do so because, according to page 4 of the record of appeal, the names of the selected assessors were not shown in the record of 24th May, 2017. She contended that even the trial judge did not direct the assessors on their role and duty in the trial before the commencement of the trial. For these anomalies, Ms. Mathayo urged the Court to nullify the proceedings, quash the conviction, set aside the sentence and order a retrial of the case as it was done in the case of **Michael Kazanda @ Kaponda and 2 Others v. The Republic**, Criminal Appeal No. 374 of 2017 (unreported).

To the learned State Attorney's submission, Mr. Tuthuru did not have any rejoinder.

On our part, having heard the submissions of the learned counsel for both sides, we wish to start our discussion with the provisions of the law dealing with the conduct of the criminal trials before the High Court with the aid of assessors. The key legislation guiding the conduct of the criminal trials in Tanzania Mainland is the CPA whereby Part VIII provides for the

procedure in trials before the High Court and more specifically section 265 of the CPA which stipulates the practice and mode of trials 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."

Further, section 283 of the CPA provides for the procedure of choosing the assessors that:-

*"Where the accused person pleads "not guilty" or if the plea of "not guilty" is entered in accordance with the provisions of section 281, **the court shall proceed to choose assessors, as provided in section 285, and try the case.**"* [Emphasis is added].

It is instructive to emphasize here that the duty of selecting assessors is upon the trial court. This is clearly stipulated under section 285 of the CPA that reads:-

- "(1) Where the trial is to be conducted with the aid of assessors, the assessors shall be selected by the court.*
- (2) An assessor may aid in more than one trial, successively."*

It is only after the assessors have been chosen, the trial of the case shall commence by inviting the advocate for the prosecution to open the

case against the accused person, call witnesses and adduce evidence in support of the charge (See section 288 of the CPA). In other words, the trial shall commence in the presence of the assessors and they shall be present throughout a trial, with an exception when there is a trial within a trial. That is why section 287 of the CPA requires that:-

"where the trial is adjourned, the assessors shall be required to attend at the adjourned sitting and at any subsequent sitting until the conclusion of the trial."

In that regard, the erstwhile Court of the Appeal of East Africa in the case of **The Republic v. Assa Singh** (1937) 4 EACA 41 echoed for the attendance of assessors from the beginning of the trial till the end and when adjourned they must also attend on the resumed date of hearing failure of which vitiates the proceedings. In that case it was held:-

"Where an assessor is absent during one day's hearing of the trial and is allowed to resume and give an opinion on the case, the trial is a nullity." [Emphasis is added].

Having expounded the position of the law, let us now look at what transpired in appellants' trial before the High Court. The trial of the

appellants commenced on 24/5/2017 and the extract of the proceedings on that date is as follows:-

"Date: 24/5/2017

Coram: Hon. J. A. De-Mello, J.

Mbogoro State Attorney for the Republic.

Msafiri Adv. Counsel for the 1st Accused

Godfrey Adv. Counsel for the 2nd Accused

Accused names: 1. Godfrey s/o William @ Matiko

2. Thomas s/o Mwita @ Nyamhanga

Are present under custody and represented by **Msafiri for the 1st Accused** and **Godfrey Advocate** for 2nd Accused.

Interpreter: Renatus D. Kerenge, English into Kiswahili and vice versa.

Notice of Trial on Information for **Murder c/s 196 and 197 of the Penal Code, Cap. 16**, was duly served on the accused and, now before the court on the 24/5/2017.

Information is read over and, explained to the accused person in his/her own language and he/she is required to plead thereto:

1st Accused Plea: "NOT TRUE"

2nd Accused Plea: "NOT TRUE"

Entered as a PLEA of, "NOT GUILTY"

1st Accused: "NOT GUILTY"

2nd Accused: "NOT GUILTY"

Mbogoro S/A: *The matter is schedule for Trial today and, I fend for the Republic. The accused two of them, are present. The three (3) wise Assessors are present too, Madam Judge. I pray for their positioning.*

Court: *It is so and, granted.*

Mbogoro S/A: *I have two witnesses with me here today. I pray for their presence.*

Court: *Let PW1 take his position."*

From the above, it is obvious that the trial of the appellants commenced without adhering to the statutory procedure of selecting assessors. It is gathered that the assessors were proposed by the learned State Attorney who beseeched the trial court to allow the assessors to take their position and accordingly it was granted as prayed. It is noteworthy to stress here that, the trial judge must ensure that he/she take the charge of selecting the assessors. On this, we wish to draw an inspiration from the Court of Appeal in Kenya in the case of **Mungai v Republic** [1984] 1 EA 318 where almost a similar scenario happened and that Court stated:-

"... the court shall select the assessors and a court should take care not to appear to confirm rather than to select assessors."

We are persuaded and entirely agree with that remark and we wish to add that since it is a statutory requirement that assessors are part and

parcel of the criminal trial before the High Court, the trial court should ensure compliance with the provision of the law on the selection of assessors. For that matter, it was expected for the trial judge to indicate in the proceedings the names and age of the chosen assessors for the appellants to make a meaningful objection, if any. The selection of assessors must be patent on the record to give comfort and assurance to the accused person that the selection was done fairly, impartially and with open minds.

As alluded herein, there was no indication in the proceedings of the trial court that the trial court formally selected the assessors. It was the prosecution that asked the trial court for the assessors to take their position in the trial. This amounted to no more than failure of justice because in the eyes of law, the prosecution made itself part and parcel of the process of selecting the assessors which goes against the cherished principle of, as it was then in the medieval times, trials by peers. In that regard, this Court in **James @ Shadrack Mkungilwa and Another v. The Republic**, Criminal Appeal No. 214 of 2010 (unreported) stated that:-

"Trial with assessors or by jury (as in other jurisdictions) who were presumed to be best placed to evaluate the facts has its origins from the medieval times in England in the cherished idea of

trial by peers, and has since been regarded as part of the process of fair trial in all serious offences in our jurisdiction. It is also hailed as promoting transparency in the administration of criminal justice.”

Further in **Mashaka Juma Ntalula v. Republic**, Criminal Appeal No. 159 of 2015 (unreported) this Court said:-

“It is fundamental that, justice should not only be done but seemed to be done. This is regardless of the outcome of the trial, considering that the fair administration of justice is the exclusive domain of court which includes assessor who throughout the conduct of trial must be impartial and not biased.”

We fully associate ourselves with the views expressed by the Court in the above cases.

Unfortunately, despite the failure of the trial judge to select assessors formally, she did not also give the appellants opportunity to comment whether they had any objection to the assessors before they participated in the trial.

The importance of the trial court to comply with the procedure of informing the accused person his right to comment on the chosen

assessors was extensively discussed in in the case of **Laurent Salu and 5 Others v. The Republic**, Criminal Appeal No. 176 of 1993 (unreported) when the Court faced similar situation and it stated as follows:-

"Admittedly, the requirement to give the accused the opportunity to say whether or not he objects to any of the assessors is not a rule of law. It is a rule of practice which, however, is now well established and accepted as part of the procedure in the proper administration of criminal justice in the Country. The rationale of the rule is fairly apparent. The rule is designed to ensure that the accused has a fair hearing."

The position was restated in the case of **Hilda Innocent v. The Republic**, Criminal Appeal No. 181 of 2017 (unreported) when the Court said:-

"It is instructive to note that involvement of assessors as per section 285 (1) of the CPA begins with their selection. The trial judge therefore must indicate in the record that the assessors were selected, followed by asking the accused person if

he objects to the participation of any of the assessors before the commencement of a trial. This must usually be followed by the usual practice that the trial judge must inform and explain to the assessors their role and responsibility during the trial up to the end where they are required to give their opinions after summing up of the trial judge."

The Court then went further to stress that:-

"...it is equally important although informing the assessors on their role and responsibility is a rule of practice and not a rule of law, as it is for a long time an established and accepted practice in order to ensure their meaningful participation, a trial judge must perform this task immediately after ascertaining that there is no any objection against any of the assessors by the accused before commencing the trial. It is also a sound practice that a trial judge has to show in the record that this task has been fully performed. For even logic dictates that whenever a person is called upon to

assist in performing any task or to offer any service, he must be fully informed of what is expected of him in performing that task. Thus, failure to inform assessors on their role and responsibility in the trial diminishes their level of participation and renders their participation which is a requirement of the law meaningless."

We entirely subscribe to the above position. Given the fact that the proceeding subject of the present appeal is silent as to whether the appellants were given an opportunity to express their view on the selected assessors nor was there any direction given to assessors on their role and responsibility, we are settled in our mind that such omission amounted to an irregularity that vitiates the whole proceedings of the trial court. Consequently, we find merit on the first and second grounds of appeal.

In the end, we hereby nullify the proceedings of the trial court, quash the conviction and set aside the sentence meted out against the appellants. Having nullified the proceedings, we refrain from analyzing the evidence. Thus, we make an order of an expedited retrial of the appellants as we consider that to be in the interest of justice in the circumstances. For

avoidance of doubt, we order that the appellants should remain in custody to wait for a retrial before another judge with a new set of assessors.

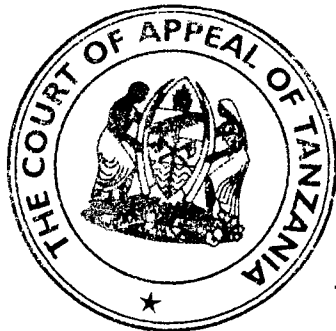
DATED at **MWANZA** this 16th day of February, 2021.

S. E. A. MUGASHA
JUSTICE OF APPEAL

F. L. K. WAMBALI
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

This Judgment delivered this 17th day of February, 2021 in the presence of Mr. Constantine Mutalemwa, learned advocate holding brief for Mr. Cosmas Tuthuru, learned advocate for the Appellants and Ms. Georgina Kinabo, State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.




D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL