

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

(CORAM: WAMBALI, J.A., LEVIRA, J.A. And KAIRO, J.A.)

CRIMINAL APPEAL NO. 537 OF 2017

ABDALLAH JUMA @ BUPALE APPELLANT

VERSUS

THE REPUBLICRESPONDENT

**(Appeal from the Judgment of the High Court of Tanzania
at Shinyanga)**

(Makani, J.)

Dated the 17th day of November, 2017

in

Criminal Session No. 14 of 2015

JUDGMENT OF THE COURT

10th & 20th August, 2021

KAIRO, J.A.:

In the High Court of Tanzania at Shinyanga, the appellant, Abdallah Juma @ Bupale was charged, tried and convicted of the offence of murder contrary to section 196 of the Penal Code, Cap 16 RE 2002 (now R.E 2019). He was sentenced to suffer death by hanging. According to the information filed against him, the appellant on 18th December, 2007 at Wendele village within Kahama District in Shinyanga Region did murder one Steven s/o Balozi. The appellant denied the charges leveled against him, hence a full trial after which he was convicted and sentenced to suffer

the mandatory death sentence as alluded to above. Following the conviction and sentence, the appellant decided to lodge this appeal to protest his innocence armed with a memorandum of appeal containing two grounds of appeal. However, for the reason to be unfolded, we shall not discuss them in this appeal.

When the appeal was called on for hearing, Mr. Audax Constantine, learned advocate appeared representing the appellant, while Mr. Jukael Reuben Jairo assisted by Ms. Caroline Mushi, both learned State Attorneys appeared for the respondent, Republic.

Before inviting the counsel for the parties to submit for and against the grounds of appeal, we prompted them to address us on whether the trial court selected the assessors and informed them about their roles before the commencement of the trial. We also requested the counsel to submit on whether the appellant was asked as to whether he had objection to the selected assessors. We understand that the issue was not part of the appellant's complaints in this appeal, but we are of the view that it is necessary for us to raise it *suo motu*, being an important matter to be addressed first before embarking on considering and determining the grounds of appeal.

Mr Jairo was the first to react and submitted that the trial court did not discharge its obligation properly. He contended that, the trial court record is silent on the appointment of the assessors and referred us to page 11 of the record of appeal whereby only their names were listed. He further contended that the appellant was neither accorded with the opportunity to comment on whether he objected or otherwise to the appointment of the assessors who sat to assist the trial court in the determination of his case nor were the roles of assessors explained to them before the commencement of the trial. He argued that the omission was contrary to the provisions of section 285(1) of the Criminal Procedure Act, Cap 20 R.E. 2019 (the CPA). When further asked on the repercussion of the pointed-out shortcomings, Mr. Jairo submitted that the impact is twofold; **one**; that the omission caused injustice to the appellant, and **two**; that the assessors were unable to ask questions for clarification as they did not understand their roles and what is expected of them. Mr. Jairo amplified that throughout the record, no assessor asked any question for clarification after all the prosecution witnesses testified. He referred us to pages 19, 20, 24, 26 and 28 of the record of appeal to substantiate his contention. Mr Jairo was firm that, in the circumstances of the conduct of

the case at hand, there was no fair trial on the part of the appellant as he was denied a chance to comment if he had objection to any of the assessors before his trial, nor could it be said that the trial was conducted with the aid of the assessors as per the dictate of the law under section 265 of the CPA. He thus, urged us to invoke the powers of revision bestowed upon us by section 4(2) of the Appellate Jurisdiction Act, Cap 141 R.E. 2019 (the AJA) to nullify the trial court proceedings, quash the conviction and set aside the sentence imposed on the appellant. For the interest of justice, Mr Jairo also prayed for the order of retrial of the case citing the case of **Elly Milinga v. Republic**, Criminal Appeal No. 362 of 2018 to back up his submission.

When invited to comment on the issue raised by the Court, Mr. Constantine readily conceded to the submission of Mr. Jairo. He was firm that failure to inform the assessors on their roles impaired their effective participation during trial and that is why they did not ask questions for clarification as they were not aware of their roles. He amplified that since the High Court hears and determines murder cases with the aid of assessors, the omission is tantamount to trial being conducted without the aid of assessors which renders it a nullity. He urged us to nullify the entire

proceedings, quash the conviction and set aside the sentence. As a way forward, Mr. Constantine joined hands with Mr. Jairo that in view of the factual setting of the case in the record of appeal, we should exercise our revisional power under section 4 (2) of the AJA and order a retrial of the case before another judge and a new set of assessors.

Having heard the submissions of the counsel for both sides, we think it is imperative to commence our determination with the legal position on the flaws pointed out by the learned counsel which touch three aspects: **One;** selection of assessors, **two;** omission to give a chance to the appellant to express whether he had objection to the involvement of any of the selected assessors and **three;** explanation on their roles and responsibilities.

It is a legal requirement that all criminal trials before the High Court must be conducted with the aid of assessors. The key procedural legislation that guides the conduct of criminal trials in Tanzania Mainland is the CPA whereby Part III provides for the procedure in trials before the High Court and specifically section 265 of the CPA provides for the modality to conduct such trials. For ease of reference, the section provides: -

"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."

Furthermore, section 283 of the CPA provides for the procedure of choosing the assessors as follows: -

"where the accused person plead "not guilty" or if the plea of "not guilty" is entered in accordance with the provision of section 281, the court shall proceed to choose assessors, as provided in section 285 and try the case."

In addition, section 285 of the CPA provides: -

"(1) where the trial is to be conducted with the aid of assessors, the assessors shall be selected by the Court.

(2) N/A"

From the above quoted provisions, the duty of selecting assessors is upon the trial court before the commencement of the trial. In the case at hand, the record of appeal at page 11 shows that, on 18th day of October, 2017, the trial court noted the presence of witnesses and assessors. It went on to list the names of the assessors, presumably, the ones selected by the trial court to sit with in determining the matter at hand and then

adjourned the hearing to 2nd of November, 2017. As to whether the noting and listing of the names alone is sufficient or not, shall be discussed shortly.

Moreover, in accomplishing the court's obligation provided in the above cited provisions, it is settled law that the trial court is obliged to explain to the selected assessors, their roles in the conduct of the trial and accord an opportunity to an accused person to comment whether or not he has objection to any of the assessors. There is a plethora of decisions of the Court stating this position, among them is **Tongeni Naata v. Republic** [1991] T.L.R. 54 wherein the Court observed as follows: -

*"As for the last ground of appeal it was held in **Ndiragu Nyagu v. R** [1959] E.A.75 that it is a sound practice which has been followed and should be followed to give an opportunity to an accused to object to any assessors..."*

The stance was later restated in our various decisions such as **Hilda Innocent v. Republic**, Criminal Appeal No.181 of 2017, **Fadhil Yussuf Hamid v. Director of Public Prosecutions**, Criminal Appeal No. 129 of 2016 (both unreported) to mention but a few. In **Hilda Innocent** (supra), the following extract was quoted from the case of **Laurent Salu and 5**

others v. Republic, Criminal Appeal No.176 of 1993 (*unreported*) which in our opinion is worth reciting in this appeal: -

"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 this country. The rationale for the rule is fairly apparent. The rule is designed to ensure that the accused person has a fair hearing. For instance, the accused person in a given case may have a good reason for thinking that a certain assessor may not deal with his case fairly and justly because of, say, a grudge/ misunderstanding/ dispute or other personal differences that exist between him and the assessor. In such circumstances in order to ensure impartiality and fair play, it is imperative that the particular assessor does not proceed to hear the case/ if he does then in the eyes of the accused person at least justice will be seen to be done. But the accused person, being a layman in the majority of cases, may not know of his right to object to an assessor. Thus, in order to ensure a fair trial and to make the

*accused person have confidence that he is having a fair trial, it is of vital importance that he is informed of the existence of this right. **The duty to so inform him is on the trial judge**, but if the judge overlooks this, counsel who are the officers of the court have equally a duty to remind him of it".*
(emphasis added)

On the other hand, the trial court is also required to explain to the selected assessors their roles and responsibilities in the trial and what the court expect of them in the conduct of the hearing, and at the conclusion of the evidence. We are aware that informing assessors on their roles is a rule of practice as well and not of law, but it is a long established and accepted practice geared to ensure effective and meaningful participation of the assessors. The practice requires the trial judge to discharge this duty before the commencement of the trial after establishing that the accused person has no objection against any assessor. We hasten to add that, the trial judge has to record this process to authenticate that it was done and properly so. An omission to inform them on their roles has an adverse effect as they may not know what is expected of them, as a result they may not participate effectively so as to assist the trial court to reach a just decision as expected.

We restated the mandatory requirement for the trial court to discharge the above stated obligations in **Hilda Innocent** (supra) wherein we observed: -

"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 stressed further: -

"...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."

Having stated the legal position, we agree with the learned counsel for the parties that the learned trial judge did not discharge the duty as required by law to which we shall demonstrate. According to records of appeal, the trial of the case at hand commenced on 18th October, 2017. We wish to reproduce the extract of the proceedings on the said date to when the trial begun so as to appreciate what transpired at the trial court. The extract will further assist us to answer the issue we raised;

"High Court Session at Kahama

Date: 18/10/2017

Coram: Hon. V. L. Makani, Judge

***Ms. Magreth Ndaweka, Senior State Attorney,
State Attorney for the Republic***

*Accused names: **ABDALLAH JUMA @ BUPALE** is present under custody and represented by Mr. **FESTO LEMA**, Advocate Bench Clerk **MWANAID A. SELEMAN**, notice of trial on information for **Murder** Contrary to Section 196 of the Penal Code was duly served on the accused, before the Court on **18/10/2017**.*

Information is read over and explained to the accused person, in his own language and he is required to plead thereto.

*Plea: "**SI kweli**"*

*Entered as a plea of "**Not Guilty**" to the charge.*

V. L. MAKANI
JUDGE
18/10/2017

***Mr. Lema:** We have no objection to the prayer.*

***Ms. Ndaweka::** The matter was for hearing today and we have 8 witnesses who are present in court. We expect to bring an exhibit which is a car with registration No.440 AEK Toyota mark II, but the said car is in Shinyanga. We are therefore praying that the matter be adjourned so that we make a follow up of the said exhibit in order that it is brought to court.*

*We prays that the matter comes for hearing on **2/11/2017***

V. L. MAKANI
JUDGE
18/10/2017

Ms. Ndaweka: *The witnesses who are here today are:-*

- 1. E. 9246 D/C Dickson*
- 2. Paschal Washa*
- 3. Makelemo Lushinde*
- 4. Msafiri Nkwabi*
- 5. Lugumba Kashinje*
- 6. Bundala Charles*
- 7. SSP. Lutufyo*
- 8. C. 98905 D/CPL Laurent*

V. L. MAKANI
JUDGE
18/10/2017

Court: *Noted that all the witnesses mentioned are present and also the Assessors namely;*

- 1. Tatu Shabani*
- 2. Imelda Timoth*
- 3. Godfrey Ndimila*

V. L. MAKANI
JUDGE
18/10/2017

Order:

- 1. In view of the prayer by the prosecution,
which was not objected to by the Defence
Counsel, hearing of the matter is adjourned
to 2/11/2017*
- 2. The witnesses are warned to appear*
- 3. The accused to further remain in custody.*

**V. L. MAKANI
JUDGE
18/10/2017"**

"High Court session at Kahama

Date: 2/11/2017

Coram: Hon V. L. Makani, Judge

For Republic: Ms Magreth Ndaweka, SSA

Accused: Present

Represented by: Mr. Festo Lema, Advocate

B/C: Mwanaid, RMA

ASSESSORS:

- 1. Tatu Shabani, 47 years Kahama 0742 823041*
- 2. Imelda Timoth, 34 years, Kahama 0755
344996*
- 3. Godfrey Ndimila, 37 years, Kahama 0764
800080*

Court: *The accused is reminded of his charge and he pleads: -*

Accused: *"Si kweli"*

A plea of "NOT GUILTY" is entered as against the charge.

**V. L. MAKANI
JUDGE
2/11/2017**

Ms. Ndaweka: *The matter is for hearing today. But I wish to make some corrections on the charge sheet that the date should read as 18/12/2007 instead of 19/12/2015*

Mr. Lema: *I have no objection as the fact corresponds to the prayer.*

Court: *The error in the charge sheet is manually corrected and should now read 18/12/2007.*

**V. L. MAKANI
JUDGE
2/11/2017**

Ms. Ndaweka: *In the charge sheet I signed on behalf of the State Attorney I pray to file an amendment to the Information showing that the drawer is the one who signed.*

Mr. Lema: *I have no objection to that.*

Court: *The prayer is granted amended information is allowed as amended.*

**V. L. MAKANI
JUDGE
2/11/2017**

Court: *The information as amended is read over to the accused person and he pleads as follows:-*

Accused: *It is not true."*

**V. L. MAKANI
JUDGE
2/11/2017**

Court: The plea of "Not Guilty" is entered.

**V. L. MAKANI
JUDGE
2/11/2017**

Ms. Ndaweka, Senior State Attorney: *We pray to proceed and I have nine witnesses and I will start with Makelemo Lushinge who cannot communicate in Kiswahili.*

PROSECUTION CASE COMMENCES..."

When the above extract is tested with the legal position, it is apparent that the trial of the appellant by the High Court commenced without adhering to the dictates of the law requiring the trial court to discharge the pointed-out obligations. Throughout the record of appeal

when the prosecution witnesses were testifying (PW1 -PW9), the assessors did not ask any clarification question. The trial court recorded "NILL" when it was the assessors turn to ask questions for clarification. Only two out of the three assessors sought for clarification after the appellant finished his testimony. It is our settled opinion that, the assessors were unable to ask questions for clarification because they were unaware of their roles. We do not want to believe that they had nothing to ask throughout the testimonies of nine prosecution witnesses. In the circumstances, the trial court recorded the evidence of PW1 – PW9 without the involvement of the assessors whose participation in this aspect is through asking questions as stipulated under section 177 of the Tanzania Evidence Act Cap.6 R.E. 2019.

We are aware that two of the assessors asked the questions after the completion of the testimony by the appellant (accused therein), but with regard to the prosecution witnesses, they acted like mere observers. Basically, the asking of questions by the two assessors cannot be concluded that their participation was optimal compared to nil questions to nine prosecution witnesses. It is our firm conviction that they so acted since they were not informed of what was expected of them. We are further aware that it is not compulsory for the assessors to ask questions

to any testifying witness, but we so state basing on the fact that the record is silent as above indicated and the minimal participation resulted. We need not insist that active participation is envisaged when the assessors sit in the trial. Though the listing of assessors' names might appear sufficient as far as their selection is concerned, but the record vividly depict that the assessors were not informed of their roles at the trial and thus the trial cannot be said to have been conducted with the aid of assessors. Besides, the omission to give the appellant a chance to state whether he objected or not to the assessors selected, denied the appellant a fair hearing as demonstrated above. Legally, both are incurable irregularities which render the trial a nullity as rightly submitted by counsel for the parties.

On our part, we entirely agree with the submitted consequence considering that assessors are an integral part of the trial conducted before the High Court. As such, the trial court was required to involve them from the very beginning of the trial to enable their active participation, and further give assurance to the appellant that his case would be tried fairly and justly by informing him his right to object or otherwise on any of the assessors selected, if he so wished. This is rooted in the principle that justice should not only be done but must as well seen to have been done.

At this juncture, we wish to instructively reiterate compliance by the trial courts of discharging this compulsory obligation before commencing a trial in which assessors are legally required to sit to aid the court.

The message as to what is supposed to be done by the trial court when required to sit with the assessors is well articulated in the observation of the Court in **Godfrey s/o William @Matiko and Another v. Thomas s/o Mwita @ Nyagancha V Republic**, Criminal Appeal No. 409 of 2017 (unreported) quoting **Fadhil Yussuf Hamid** (Supra) which we herein reproduce as an instructive reminder that: -

"The case of Laurent Salu and five others v. R, Criminal Appeal No. 176 of 1993 (unreported) is elaborative on all the steps which must be complied with in a trial with aid of assessors.

1) The Court must select assessors and give an accused person an opportunity to object to any of them.

2) The Court has to number the assessors/ that is/ to indicate who is number one, number two and number three/ as the case may be.

3) The Court must carefully explain to the assessors the role they have to play in the trial and what the

judge expects from them at the conclusion of the evidence.

4) The Court to avail the assessors with adequate opportunity to put questions to the witnesses and to record clearly the answers given to each one. If an assessor does not question any witness, that too, has to be clearly indicated as: "Assessor 2: Nil or no question.

5) The court has to sum up to the assessors at the end of submission by both sides. The summing up to contain a summary of facts/ the evidence adduced and also the explanation of the relevant law/ for instance/ what is malice aforethought. The court has to point out to the assessors any possible defences and explain to them the law regarding those defenses.

6) The court to require the individual opinion of each assessor and to record the same".

From the foregoing, we are settled in our mind that there were lapses in the conduct of the trial, which vitiated the entire proceedings of the trial court. Consequently, we find no need to venture on the grounds of appeal raised by the appellant herein as conceded by the counsel of the parties. In the end, in terms of section 4(2) of the AJA, we invoke the

powers of revision to nullify the proceedings of the trial court, quash the conviction and set aside the sentence imposed on the appellant. However, for the interest of justice and considering the factual setting of the case in the record of appeal, we order a retrial of the appellant to be conducted expeditiously before another judge with a new set of assessors. We also order that the appellant shall remain in custody to wait a retrial.


DATED at **SHINYANGA** this 19th day of August, 2021.

F. L. K. WAMBALI
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

L. G. KAIRO
JUSTICE OF APPEAL

The judgment delivered this 20th day of August 2021 in the presence of Mr. Audax Constantine, learned counsel for the appellant and Mr. Jukael Reuben Jairo assisted by Ms. Caroline Mushi both learned State Attorneys for the Respondent/Republic, is hereby certified as a true copy of the original.


D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL