

IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: RUTAKANGWA, J.A., MASSATI, J.A., And MUGASHA, J.A.)

CRIMINAL APPEAL NO. 135 OF 2015

SABASABA ENOSI.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the decision of the High Court of Tanzania

at Mwanza)

(De-Mello, J.)

dated the 25th day of February, 2015

in

Criminal Sessions Case No. 28 of 2007

JUDGMENT OF THE COURT

18th & 26th October, 2016

MUGASHA, J.A.:

The appellant was found guilty as charged of two counts of the murder of **OBEDI s/o NTENDELE @ KATOLE** and **JOSEPH s/o KUBONA** (deceaseds), on 19th February, 2005, at Nyamalulu B village, within Geita district in Mwanza region.

The prosecution paraded four witnesses to prove its case. These are: **MARTHA JOSEPH** (PW1), **KOROBOI MANYANGA** (PW2),

CHARLES MWENULA (PW3) and **DALAHILE JOSEPH** (PW4). Also the prosecution tendered three documentary exhibits (the Post Mortem Examination reports of the deceaseds and the Sketch map of the scene of crime).

PW1, the daughter of deceaseds, recounted that, on 19/2/2005 at around 8.00 p.m. she was with her mother at home when the appellant and another person stormed into their house. The appellant inquired on the whereabouts of her father (deceased) and her mother replied that he was in Katoro. Thereafter, the appellant forced PW1 to go to sleep, he masked her mother with a piece of Khanga and dragged her outside the house. While inside the house, PW1 heard his father singing and later being cut. She remained indoors up to the following day when she went outside and found her father lying down breathless. Later, the appellant went at the scene and she told him what befell the deceaseds. The matter was reported to PW2, the head of local militia who together with PW3, the Village Executive Officer went to the scene and PW1 told them that it was the appellant who killed the deceaseds.

Apart from PW3 testifying to have seen the appellant at 03.00pm carrying the late **JOSEPH s/o KUBONA** on the bicycle heading for a pombe club, he recalled that it was the appellant who initially, at 23.00hrs, went to his home to inquire about the alarm raised from the deceaseds' compound and early next morning resurfaced and told PW3 that the deceaseds were cut with pangas. PW3 recounted to have gone to the scene of crime where he heard PW1 mention the appellant to have killed the deceaseds. PW4 testified on what he was told by PW1 about the fateful killings and that the assailant was the appellant.

The appellant denied the charge. He also denied to have been at the pombe club with the late **JOSEPH s/o KUBONA** in the afternoon of the fateful date. He claimed to have slept in the forest on the fateful night and he had returned to the village to secure more sacks for packaging his charcoal. He added that, it was PW1 who went to his house to tell him about the incident. Thereafter, they went to the scene together, raised alarms and the villagers assembled and he was arrested.

After the close of the defence case, the trial judge summed up the evidence to the assessors who sat with her namely: **MABULA, BERNADETHA** and **MUSA TOYI**. In convicting the appellant, the learned trial judge relied on the evidence of PW1 believing her to be the eyewitness, and PW4 who was considered a credible witness. The appellant was subsequently sentenced to suffer death by hanging.

We wish to point out at the outset that we have noted that, the trial commenced on 25.9.2013 before Mwaimu, J. (predecessor judge) who took the evidence of PW1 and PW2 sitting with three assessors namely: **SOSPETER MAKANZA, SHAMTE ALLY** and **HAWA SUED** up to 3/10/2013 when the trial was adjourned to next sessions. On 11/2/2015 the trial resumed before Demello, J. (successor Judge) sitting with new set of assessors namely: **MABULA, BERNADETHA** and **MUSA TOYI**. The successor judge continued with the trial and took the evidence of PW3, PW4, and the appellant. The record is completely silent on the reason for the transfer of the case file to another judge.

Dissatisfied with the conviction and the mandatory sentence, the appellant has preferred this appeal. Initially, on 7/10/2016, the

appellant through Mr. Pauline Rugaimukamu learned counsel, filed a Memorandum of Appeal containing three grounds as follows:

- 1. That, the trial judge had grossly erred in law and fact by relying on unfavourable visual identification.*
- 2. That, the trial judge had erred in law and fact to rely on the identification factors in which no descriptive features were given and disclosed by PW1.*
- 3. That, the trial judge erred in law to ground a conviction based on the case which was not proved beyond reasonable doubt.*

On 12/10/2014, Mr. Rugaimukamu filed a supplementary Memorandum of Appeal with one following ground to the effect:

- 1. That, the trial judge did not comply with section 298 (1) of the Criminal Procedure Act Cap. 20 R.E. 2002.*

At the hearing of the appeal, the respondent Republic was represented by Mr. Hemed Hamid Halfan and Ms. Dorcas Akyoo, learned State Attorneys.

Having gathered from the record that the trial was flawed with procedural irregularities, we allowed counsel to argue only, the supplementary ground of appeal.

Mr. Rugaimukamu submitted that, after the close of the hearing of the prosecution and the defence, the summing up to assessors was not properly conducted by the trial judge who misdirected the assessors on the evidence of PW1. He argued that, this is a procedural irregularity violating the mandatory requirements of section 298(1) of the Criminal Procedure Act [**CAP 20 RE.2002**] and the trial was vitiated.

We prompted Mr. Rugaimukamu to address us on the legal consequences of the trial following the transfer of the case file to another judge without stating reasons, and each judge sitting with a different set of assessors. He pointed out that initially, the trial was conducted by Mwaimu, J. who sat with three assessors. Later, Demello, J. took over with a new set of two assessors. However, no reasons were stated for the transfer of the case file to the successor judge, and the appellant was not addressed on his rights in terms of section 299(1) of the Criminal Procedure Act (supra). He added that, the complete change of assessors was in violation of section 286 of the Criminal Procedure Act (supra) which requires at least two assessors to be present throughout the trial. He concluded that, the

procedural irregularities occasioned a miscarriage of justice on the appellant who did not get a fair trial. As such, he urged us to nullify the judgment and the proceedings of the trial court and order a retrial.

On the other hand, the learned State Attorney readily conceded that the trial was flawed with the procedural irregularities contravening sections 299(1) and 298(1) of the Criminal Procedure Act (supra). He added that, the trial judge misdirected the assessors by stressing that PW1 was the only important witness and the rest of the evidence was hearsay. He also argued that, the complete change of the assessors was improper and it vitiated the trial which is rendered a nullity. He referred us to the case of **JOHN MASWETA vs. GENERAL MANAGER (MIC) T LTD.** Civil Appeal No. 113 of 2015 (unreported) where the Court cited the case of **JOSEPH KABUI v. REGINAM EA. (1954-5)**. Furthermore, he submitted that, at page 59 of the record the trial judge introduced speculation and conjecture in her judgment having stated that:

".....The incident occurred in the month of February in which is a dry spell in this region at which the nights are coupled with full bright moon

to be able to see clearly..... After all, it was before, midnight at around 23.00hrs."

He argued that this finding is not supported by the evidence on record. We entirely agree. He concluded that, the procedural irregularities are fatally incurable and they occasioned a miscarriage of justice. So, he urged us to invoke revisional powers under section 4(2) of the Appellate Jurisdiction Act [**CAP 141 RE.2002**], quash the trial proceedings and order a retrial.

The issue for determination in the present appeal is whether the trial of the appellant was faulty and if so whether the faults went to the root of the trial itself. Both counsel have submitted that the faults centre on the transfer of the case file to another judge without due regard to section 299(1) of the CPA; the role played by the assessors who were not present throughout the trial and their misdirection at the summing up by the trial judge.

As earlier noted, it is indisputable that the trial was conducted by two different judges and no reason was availed as to the change. Section 299(1) of the Criminal Procedure Act gives following directions:

*"Where any judge, after having heard and recorded the whole or any part of the evidence in any trial, is for any reason unable to complete the trial or he is unable to complete the trial within a reasonable time, another judge who has and who exercises jurisdiction may take over and continue the trial and the judge so taking over may act on the evidence or proceedings recorded by his predecessor, and may, in the case of a trial re-summon the witnesses and recommence the trial; **save that in any trial the accused may, when the second judge commences his proceedings, demand that the witnesses or any of them be re-summoned and re-heard and shall be informed of such right by the second judge when he commences proceedings.**"*

[Emphasis supplied].

The provision outlines the procedure to be followed where a judge who commenced the trial is unable to continue with the trial having recorded the whole or part of the evidence. The successor judge may proceed to pronounce judgment on the evidence recorded by his predecessor, supplemented by the evidence recorded by himself or he may in his discretion resummon and rehear any of the witnesses already heard by his predecessor if he/she deems necessary in the interest of justice. (See **MWITA CHACHA AND 4 OTHERS VS THE REPUBLIC**, Criminal Revision No. 1 of 2007, (unreported). In addition,

the successor judge must inform the accused of his statutory right to have the trial re-commenced or continued.

The crucial issue here is whether or not the appellant, who was not addressed on his rights in terms of section 299(1) of the Criminal Procedure Act, received a fair trial. While the predecessor judge heard only the evidence of PW1 and PW2, the successor judge did not address the appellant on his rights. When the successor judge took over at resumed trial, the learned defence counsel addressed her on delay by the prosecution to parade witnesses to disprove the appellant's defence of alibi and related intricacies; he prayed that the trial should proceed. At page 29 of the record the successor judge made the following orders:

"COURT: *Well stated, I concede the defense will be testified during the defense and not before. Let us hear the two (2) witnesses for the prosecution present here today together with any other remaining, if available. It is a long pending matter I am fully prepared to accomplish it today as scheduled. Let us not waste further Courts available time.*

Order: *Court shall resume at 2.00 pm."*

The trial resumed at 2.00 pm when the successor judge received the evidence of PW3, PW4 and the appellant. However, she did not address the appellant about his rights under section 299(1) of the Criminal Procedure Act (supra). In our considered view, it was imperative that the appellant be addressed on his right to have the trial continued or re-commenced and witnesses who had earlier on testified be recalled to testify afresh after the case was transferred.

This Court had earlier on determined an appeal whereby, the trial was conducted by more than one magistrate in **RICHARD KAMUGISHA @ CHARLES SAMSON AND FIVE OTHERS VS REPUBLIC**, Criminal Appeal No.59 of 2001 (unreported). Apart from making reference to section 214 (1) of the Criminal Procedure Act (supra) that where a trial is conducted by more than one magistrate, the accused should be informed of his right to have the trial continued or start afresh and also right to recall witnesses, the Court further stated:

"In view of the fact that the right to a fair hearing is fundamental, the Court has an obligation to conduct a fair trial in all respects."

A right to a fair hearing is a fundamental right enshrined in article 13 (6) (a) of the Constitution of the United Republic of Tanzania, 1977 which *inter alia* states that:

"... Wakati haki na wajibu kwa mtu yeyote inapohitajika kufanyiwa maamuzi na mahakama au chombo kingine chochote kinachohusika, basi mtu huyo atakuwa na haki ya kupewa fursa ya kusikilizwa kwa ukamilifu..."

The English rendering is to the effect that, When then rights and duties of any person are being determined by the court or any agency, that person shall be entitled to a full hearing. Failure to address the appellant on his rights under section 299(1) of the Criminal Procedure Act violated his fundamental right to a fair trial and it occasioned a gross miscarriage of justice.

Moreover, the lacking of the reasons for the transfer of the case rendered the successor judge without the authority to continue with the trial which renders the continued trial a nullity. We thus agree with learned counsel that the trial conducted in violation of section 299 (1) of the Criminal Procedure Act, is a fatal incurable irregularity and the subsequent trial is a nullity.

On the question of proper summing up to and the change of assessors, we have deemed it imperative to point out that: **One**, it is a mandatory requirement of section 265 of the Criminal Procedure Act (supra), that all criminal trials before the High Court must be conducted with the aid of assessors. **Two**, the opinion of assessors is of great value and assistance to the trial judge if the summing up is properly conducted. (See **WASHINGTON S/O ODINGO VS REPUBLIC, (1954) 21 EACA 392**). **Three**, in the course of summing up, a trial judge should as far as possible desist from disclosing his views or making remarks or comments which might influence the assessors in one way or another in making up their minds about the issues being left with them for consideration. (See **ALLY JUMA MAWERA VS REPUBLIC, (1993) TLR 231.**)

In the matter under scrutiny, we have noted that, in the course of summing up, at page 46 of the record, the trial judge addressed the assessors as follows:

" with exception of the rest, it is PW1 Martha, a young daughter of the deceaseds who testified to have direct evidence pointing the finger to the accused whom she claimed to have seen with her own eyes as he killed the two. Her further testimony was that of observing how the

accused covered her late mother with a piece of kanga while dragging her out of the kikome where he was seated with her husband and, killed. Strangely, even having witnessed his brother cousin the accused Sabasaba she still approached him to deliver the news for the death.”

In our considered view, we think these directions were clearly expressing the judge’s own findings of fact on the evidence and had nothing to do with wanting to get the assessors opinion, but bent on influencing them to agree with her. It was wrong for the judge to have made her impressions known to the assessors. (See **LUSABANYA SIYANTENI VS REPUBLIC** (1980) TLR). We therefore agree with the learned counsel that, the trial judge misdirected the assessors during the summing up.

The attendance of assessors during trial is governed by sections 265, 286 and 287 of the Criminal Procedure Act (supra) which provide:

Section 265

“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”.

Section 286

*"If in the course of a trial with the aid of assessors but at any time before they state their opinions any assessor is, from any sufficient cause, prevented from attending throughout the trial or absents himself and it is not practicable immediately to enforce his attendance, **the trial shall proceed before the remaining assessors but if only they are not less than two in number; and where the trial so proceeds the remaining assessors shall be deemed in all respects to be properly constituted for the purpose of the trial and shall have power to return a verdict accordingly whether unanimous or by majority.**"*

[Emphasis supplied]

Section 287

"If 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".

The law as it stands does not envisage a complete change of all assessors who were in attendance at the commencement of the trial to the conclusion. At least, two assessors must be present throughout the trial. In this regard, when a trial is adjourned, section 287 of the Criminal Procedure Act directs that, the assessors shall be required to attend at the adjourned sitting and at any subsequent sitting until the conclusion of the trial. The rationale of their continued presence throughout the trial is to enable them to hear the whole evidence

which will enable them to make informed or rational opinions to assist the trial judge before giving his or her judgment. In **CLARENCE GIKULI VS REGINAM (1959) 21 EACA 3014** and **NYEHESE CHERU VS REPUBLIC (1988) TLR 140**, the Court categorically said that, a trial which has begun with the prescribed number of assessors and continues with less than two of them such trial is unlawful.

In the present matter, we have noted that, the initial assessors (**SOSPETER MAKANZA, SHAMTE ALLY** and **HAWA SUED**) who heard evidence of PW1 and PW2 were not present up to the conclusion of the trial. The subsequent assessors (**MABULA, BERNADETHA** and **MUSA TOYI**) heard the evidence of PW3, PW4 and the appellant. Besides, the summing up of the evidence was conducted in the presence of subsequent assessors who gave their opinion before the judge gave her judgment. The consequences of allowing any assessor to avail an opinion while he has not heard all the evidence were articulated in **JOSEPH KABUL VS REGINAM [1954-55] EACA Vol. XXI-2** where the Court said:

"Where an assessor who has not heard all the evidence is allowed to give an opinion on the case, the trial is a nullity".

In our considered view, since none of the two sets of assessors heard all the evidence, it was illegal for any of the assessor to give an opinion on the case. Therefore, it cannot be safely vouched that the trial was conducted with the aid of assessors as required under section 265 of the Criminal Procedure Act and the trial becomes a nullity.

In view of the aforesaid, we agree with the learned counsel that, the trial was flawed with fatally incurable procedural irregularities occasioning a miscarriage of justice and the trial was vitiated.

As to the way forward, in view of those irregularities we invoke our revisional jurisdiction under section 4(2) of the Appellate Jurisdiction Act (supra), and revise all the proceedings of the High Court. We quash the conviction and all proceedings and judgment of the trial court. We quash and set aside the sentence and order the expedited retrial from the stage reached on 3/10/2013, before another judge with three assessors if they are still available. Short of that the trial should commence *de novo*. The appellant to remain in remand custody.

DATED at **MWANZA** this 21st day of October, 2016.

E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

S.A. MASSATI
JUSTICE OF APPEAL

S.E.A. MUGASHA
JUSTICE OF APPEAL

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

P.W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL