IN THE COURT OF APPEAL OF TANZANIA

AT MTWARA

(CORAM: MBAROUK, J.A., BWANA, J.A. AND MASSATI, J.A.)

CRIMINAL APPEAL NO. 265 OF 2005

1. ISSA DIHANDO @ MAKUSEKUSE
2. MUSSA ABDALLAH KAPOLO @ RASTA } ..... APPELLANTS

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Lukelelwa, J.)

Dated the 4th day of October, 2005
in
Criminal Session Case No. 15 of 2004

JUDGMENT OF THE COURT

30 SEPTEMBER, & 5TH OCTOBER, 2010

MASSATI, J.A.:

The appellants were convicted for the offence of murder of one ISMAIL SAID @ SCOLA and sentenced to death by hanging by the High Court of Tanzania, sitting at Mtwara. Dissatisfied they are now appealing to this Court.

In this Court the appellants were represented by Mr. John Mapinduzi, learned counsel, and Mr. Ismail Manjoti, learned State Attorney, represented the republic/Respondent.

The facts as garnered from the record are that on the 18th day of December, 2002 the appellants were seen at a local pombe shop, taking some liquor. The deceased was also there. At that place, they were heard by one of the prosecution witnesses to have threatened the deceased, to the effect that, he (the deceased) would not live to see either the next morning, or the next initiation ceremony.

Later in the evening, the deceased was seen being brutalized by the roadside by two persons. Next morning, he was pronounced dead. For some reasons which we do not need to go into now, the appellants were arrested in connection with the death, and later charged and convicted as seen above.

Mr. Mapinduzi, learned Counsel, adopted the grounds shown in the appellants' joint memorandum of appeal but decided to condense them into two. First, he pointed out some procedural irregularities which could lead to the nullification of the trial. He quickly pointed out that while the trial court's attention was drawn to the potential conflict of interest between the appellants, and having ordered that each of the appellants be provided with a different advocate; it never saw to it that an advocate was available for each one of them. Therefore, the learned counsel argued, one of the appellants, namely the first appellant, did not get a fair trial. Therefore the whole trial was a nullity on that account. The second irregularity was that since the 1st appellant was not represented, the preliminary hearing was conducted in the absence of his counsel. Furthermore, exhibits such as the postmortem examination report and the sketch plan, were tendered at that stage without complying with the legal requirements set out under section 192 of the Criminal Procedure Act (Cap 20 – R.E 2002). In his view, this irregularity was also incurable and capable of vitiating the proceedings.

The learned counsel then went on to submit in the alternative, that should the Court disagree with him on the effect of the procedural irregularities, we should find that the prosecution case was not proved beyond reasoned doubt. He reasoned that since it was nearing dusk, with doubtful visibility and the crime had not been reported immediately, PW2 and PW3 who claimed to have witnessed the beating of the deceased should not be believed. Besides, even going by the evidence of these witnesses, it is clear that the 1st appellant just stood by watching while the deceased was being beaten. Mere presence at the scene of crime did not necessarily make him a party to the crime, argued the learned counsel. In his view, the learned trial judge, misapplied the provisions of sections 22 and 23 of the Penal Code (Cap 16 – R.E 2002). So in the alternative, Mr. Mapinduzi, urged us to allow the appeal and quash the conviction and set aside the sentence.

Mr. Manjoti, the learned State Attorney, quickly conceded to the existence of the procedural irregularities in the trial. He was of the view that, since the first appellant was not represented, he did

not get a fair trial, and so the trial was a nullity, and asked us to order a retrial.

But on the merits of the appeal and in the alternative, Mr. Manjoti submitted that on the basis of the evidence of PW1, PW2 and PW3, the prosecution had proved beyond any reasonable doubt that the appellants had formed a common intention and both had jointly committed the offence. He strongly disagreed that sections 22 and 23 of the Penal Code had been misapplied by the trial judge. So, he wound up by urging us to dismiss the appeal if we find that the irregularities were curable.

Section 310 of the Criminal Procedure Act (Cap 20 – R.E 2002) enacts an accused's right to be defended. It provides:-

> *"310. Any person accused before any criminal court, other than a primary court, may of right be defended by an advocate of the High Court, subject always to the provisions of any rules of*

court made by the High Court under powers conferred by Article 26 of the Tanganyika Order in Council 1920, from time to time in force."

In **LEKASI MESAWARIEKI v REPUBLIC** (1993) TLR. 139 (CAT) the appellant and his son were tried without the aid of legal counsel after they had intimated to the trial court that they would defend themselves. The son was acquitted. The (father) the appellant was convicted for murder and sentenced to death. On appeal, this Court quashed the proceedings and judgment and ordered a retrial because:-

"the appellant did not and could not get a fair trial without legal assistance".

In that case the Court followed its earlier decision in **LAURENT JOSEPH AND ANOTHER v R,** (1981) TLR 35. But the Court put it more eloquently in **DAWIDO QUIMUNGA v R**, (1993) TLR 120

where, again, the appellant was tried without legal assistance and convicted of murder. It held:-

> *"The absence of counsel in a trial involving a charge carrying the death penalty deprived the trial court of assistance so vital that it cannot be said that the appellant had a fair and just trial."*

This is a sound principle to which we would add that, it cannot be far fetched to say that it is one of the essential components implied in the notion of a fair trial which is now jealously guarded by Article 13 (6)(a) of the Constitution of the United Republic of Tanzania.

In the present case, both appellants were initially represented by Mr. Mlanzi. He appeared for them during the taking of their pleas and preliminary hearing on 25.7.2005, where two exhibits were received in evidence. In the middle of the preliminary hearing, and

after the first appellant (then first accused) had aired some misgivings about the handling of his rights, Mr. Mlanzi reported that there appeared to be some conflict of interest among the accused persons "*with the second accused inculpating the first accused*". After hearing the prosecuting attorney, the trial court gave the following orders:-

1. *"(not relevant)*
2. *Since there is conflict of interest between the two accused persons. The two accused persons to be provided advocates at the trial of their case."*

The court then went on to draw the memorandum of matters not in dispute, but before which only the second accused was asked and his answer recorded. But at the end, both appellants were asked to append their signatures to the memorandum. This, in our view, was not fair to the first appellant.

When the case resumed for trial on 23/9/2005, there was only one advocate, Mr. Kiozya. It is not clear whether the trial judge reminded himself of his previous order or inquired to know who Mr. Kiozya was representing, or whether there was still a conflict of interest among the accused persons.

Mr. Kiozya was present throughout the prosecution case, and at the close of the case, he is recorded to have said:-

> *"The accused persons shall make a sworn statement for defence and call three witnesses".*

This can only mean that Mr. Kiozya now represented both accused persons.

In our view, the procedure followed by the trial court was not correct. First, since section 192 (1) of the Criminal Procedure Act requires that a preliminary hearing be held in the presence of an accused and his advocate, and since the court was already informed that the accused persons had a conflict of interest, and since the

court had ordered that a separate advocate be assigned to each of the accused persons, it was wrong for it to proceed with the preliminary hearing. The court should have stopped there, and reopen the preliminary hearing once each of the appellants was represented as ordered, or unless the court was informed that the conflict of interest between the accused persons had been ironed out. But, secondly before the trial took off, the court was duty bound to ascertain about the status of the accused persons' legal representation. Since no such inquiry was made, we can only assume that the court had forsaken its bounden duty, in ensuring that the appellants received a fair and just trial.

It is true that the appellants gave their defence on oath, led by Mr. Kiozya and Mr. Mdamu who appeared to be representing both. But if the conflict of interest between the appellant was still there, it is not difficult to see that, one of the appellants was effectively denied the right to cross examine the other. This was, in our view, highly prejudicial to the first appellant, especially in the absence of any exceptional or cogent reasons for doing so which should have been reflected in the record.

All said and done, we think this ground is sufficient to dispose of this appeal. The irregularities shown above are incurable and vitiate the whole trial. All the proceedings, judgment, and sentences are quashed and set aside.

We have anxiously considered whether or not to order a retrial. The principles governing whether or not to order a retrial were succinctly summed up by the erstwhile Court of Appeal for East Africa in **FATEHALI MANJI v R,** (1966) E.A 343:

> *"In general a retrial will be ordered only when the original trial was illegal or defective; It will not be ordered where conviction is set aside because of insufficiency of evidence or for purposes of enabling the prosecution to fill up gaps in its evidence at the first trial, even when a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial*

would be ordered; each case must depend on its facts and circumstances and an order for retrial should only be made where the interests of justice require it".

Having regard to the totality of the circumstances of the present case, and the evidence on record, we think that an order for a retrial would be in the interests of justice. We so order.

DATED at MTWARA this 4th October, 2010.

M.S. MBAROUK
JUSTICE OF APPEAL

S.J. BWANA
JUSTICE OF APPEAL

S.A. MASSATI
JUSTICE OF APPEAL

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

M.A. MALEWO
DEPUTY REGISTRAR
COURT OF APPEAL