IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: LUANDA, J.A., MMILLA, J.A., And MKUYE, J.A.)

CRIMINAL APPEAL NO. 357 OF 2015

EMMANUEL FULA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the Decision of the High Court of Tanzania at Mwanza)

(Ebrahim, J.)

Dated the 21st day of July, 2015
in
Criminal Sessions Case No. 172 of 2012

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JUDGMENT OF THE COURT

5th & 7th December, 2017.

LUANDA, J. A.:

The appellant Emmanuel Fula was charged in the High Court of Tanzania (Mwanza Registry) with murder. It was alleged in the charge sheet that he murdered one Magreth d/o Samora @ Ghati, a girl of about 8 years old. The appellant pleaded not guilty to the charge and so the case went on full trial. At the end of the trial, the appellant was convicted as charged and sentenced to death by hanging.

Aggrieved by the finding of the High Court, the appellant has preferred this appeal in this Court.

While in prison, the appellant filed his memorandum of appeal consisting of six grounds. Sometime in November, 2017 to be precisely on 13th day of November, Mr. Deocles Rutahindurwa, learned counsel who was assigned to defend the appellant filed yet another memorandum of appeal consisting one ground of appeal.

When the appeal came for hearing on 5/12/2017, Mr. Rutahindurwa prayed to drop the two memoranda of appeal filed, in its stead he prayed to file a fresh one consisting of one ground of appeal which he formulated there and then of which the respondent/Republic did not resist. In the interest of justice, we allowed him to do so under Rule 4 (2) (a) of the Court of Appeal Rules, 2009 (the Rules). The ground he raised runs as follows:-

> *"The learned trial judge erred in law by inviting the assessors who sat with her to give a joint opinion contrary to section 298 (1) of the Criminal Procedure Act, Cap. 20 R.E. 2002."*

It is the submission of Mr. Rutahindurwa that according to section 298 (1) of the Criminal Procedure Act, Cap. 20 R.E. 2002 (the CPA) it is the

requirement of the law that when the case on both sides is closed, the trial judge is required to sum up the evidence for the prosecution and the defence and shall then require each of the assessors to state his/her opinion orally as to the case generally and as to any specific question of fact addressed to him/her by the judge and record the opinion.

In this case, (he made reference to page 62 of the record) he went on to say, the trial learned judge took a joint opinion of all assessors she sat with her. Mr. Rutahindurwa said that was wrong. He invited the Court to invoke its revisional powers as provided under section 4 (2) of the Appellate Jurisdiction Act Cap. 141 R.E. 2002 (the AJA), quash the proceeding from page 62 of the record onwards and leave the remaining portion intact and remit the record to the High Court so that the trial judge and the same set of assessors may do the needful. However, if it is not practical to do that, then he asked the Court to quash the entire proceedings, judgment and set aside the sentence and order a retrial. He cited the case of **Emmanuel Malobo vs. R.,** Criminal Appeal No. 356 of 2015 (CAT – unreported).

The Republic/respondent in this appeal was represented by Mr. Emmanuel Luvinga, assisted by Ms. Maryasinta Lazaro, learned State

Attorneys. Mr. Luvinga supported what has been said by Mr. Rutahindurwa, save the first suggestion to quash the portion involved alone. Mr. Luvinga said the entire proceedings and judgment should be quashed and sentence set aside. There should be a retrial. The reason for this proposition is that there was no trial with the aid of assessors.

Page 62 of the record of appeal shows very clearly that the assessors who sat with the trial learned judge gave a joint opinion. As correctly pointed out by Mr. Rutahindurwa and Mr. Luvinga, that goes contrary to section 298 (1) of the CPA which requires each assessor to give his/her opinion. The section is couched in mandatory terms; it has to be complied with.

In **Emmanuel Malobo** case cited *supra* a similar situation arose. This Court said as follows:-

> *"As correctly pointed out by Mr. Sarige, section 298(1) of the CPA requires the trial judge to demand a separate opinion from each of the assessors sitting with him. It was therefore a*

violation of that provision for the assessors in the present case to have given a joint opinion.

This Court has previously dealt with this situation. This in ***YUSUPH SYLVESTER v. R,*** *Criminal Appeal No. 126 of 2014 (unreported) the Court held that, where assessors give a joint opinion, the opinion is in vain and the trial is deemed to have been one without the aid of assessors, and so vitiates the entire proceedings. In that case the Court quashed the proceedings and ordered a retrial."*

The outcome of assessors giving a joint opinion is taken that, the judge to have conducted the trial without the aid of assessors. The trial is a nullity. In the exercise of our revisional powers as provided under section 4 (2) of the AJA, we quash, save the preliminary hearing, the entire proceedings and its judgment of the High Court and set aside the sentence of death by hanging. We order the appellant to be tried afresh before another judge and a new set of assessors. Until the time when the trial will resume afresh the appellant shall remain in prison as a remand prisoner.

Order accordingly.

DATED at **MWANZA** this 6th day of December, 2017.

B. M. LUANDA
JUSTICE OF APPEAL

B. M. MMILLA
JUSTICE OF APPEAL

R. K. MKUYE
JUSTICE OF APPEAL

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

E. Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL