IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MBAROUK, J.A MUSSA, J.A. And LILA, J.A.)

CRIMINAL APPEAL NO. 80 OF 2015

TIMOTH S/O SANGA
JOSEPH S/O MADRESS ..... **APPELLANTS**

VERSUS

THE REPUBLIC .... **RESPONDENT**

(Appeal from the decision of the High Court of Tanzania at Dar es Salaam)

(Mwaikugile, J.)

dated the 14th November, 2011
in
Criminal Sessions No. 73 of 2008

JUDGMENT OF THE COURT

2nd & 16th August, 2016

LILA, J.A.:

Timoth Sanga and Joseph Madress, the first and second appellant respectively and three others jointly and together, stood charged with the offence of murder before the High Court sitting at Morogoro. The charge sheet alleged that the homicide occurred on or about 7/11/2007 at Tsango Village Mgeta within Kilombero District in Morogoro Region. The charge alleged that the person murdered is Francis Lucas Kipange. Before trial

commenced, the charges against the other three accused persons namely Evaristo Manga, Peter Francis Msongele and Menhard Mbeso were withdrawn under section 91(1) of the Criminal Procedure Act, Cap 20 R.E. 2002 (herein to be referred to as the CPA). The two appellants distanced themselves from the accusation. Trial ensued. The prosecution called six witnesses to prove the charge against the appellants. For the defence, only the two appellants gave evidence. At the end, they were convicted with murder and were handed down the statutory sentence, to suffer death by hanging. Dissatisfied, they filed this appeal to this Court.

When the appeal was called on for hearing Mr. Bethuel Peter, learned advocate for the appellant, rose and informed the Court that he was representing one Joseph Madress, the second appellant alone as the first appellant has passed away and that there is a letter attached with the copy of death certificate to that effect from the Prison Officer In-charge Isanga Prison Ref. No. 102/DO/1/XIV/178 dated 08/05/2015. He said, in the circumstances, the appeal by the first appellant accordingly abates. We accordingly marked the appeal against Timoth Sanga, the first appellant, to have abated under Rule 78(1) of the Court of Appeal Rules, 2009 (herein to be referred only as the Rules).

Consequent to the abatement of the appeal by the first appellant, hearing of the appeal proceeded against the second appellant only. We shall, in this judgment, refer to him as the appellant.

Mr. Bethuel Peter, learned advocate, said he would submit the grounds of appeal as were filed by the appellant himself. However, before submitting on the grounds of appeal we asked both Mr. Bethuel Peter, learned advocate for the appellant and Mr. Nassoro Katuga, learned Senior State Attorney, for the Respondent/Republic, to address the Court on the propriety of the trial in view of the fact that the assessors are recorded to have had cross examined the witnesses.

Mr. Bethuel Peter was the first to address the Court and he said that the record vividly shows that the assessors cross-examined the witnesses which was a contravention of the requirements of section 177 of the Tanzania Evidence Act, Cap. 6 R.E. 2002 (herein to be referred to as to as TEA). He said, the proceedings of the trial court were a nullity and prayed that the appellant's conviction be quashed, the sentence be set aside and the appellant be set free. When asked why an order of retrial should not be made, he was of the view that the appellant have been in prison as a

remandee and later as a prisoner for ten years. Pointing at the weaknesses of the prosecution evidence against the appellant, Mr. Bethuel contended that even if retrial is ordered it is unlikely that the conviction will be secured. He further pointed out that the conditions for a proper and unmistaken identification of the appellant were not favourable and the only prosecution eye witness one Paulo Raphael Mboya (PW1) was not able to give the description of the persons he saw and identified at the crime scene, did not mention the names of such assailants to the person he first met (PW2 one Flora Sambaya, a village chairman) and that PW1 and PW2 differed in the time they allegedly met. He added that Rose James Kilembe (PW3) clearly said he did not know the appellant. In view of the serious procedural irregularities and the weaknesses of prosecution evidence against the appellant, he prayed that the Court not to order retrial.

For his part, Mr. Nassoro Katuga conceded that it was not procedurally proper for the assessors to cross examine the witnesses. He supported the view that the trial court proceedings be nullified. As to whether the appellant should be set at liberty or a retrial order be made, he insisted that the prosecution evidence is sufficient to establish the charge against the appellant. He pointed out that PW1 told the trial court

that he heard the appellant and identified him by voice as he knew him prior to the incident as they live in the same village and that he later saw and identified him at the scene of crime when collecting maize grasses so as to burn the deceased with the assistance of light from the burning grasses. That, PW1 said the burning grasses gave enough light which would enlight up to 70 meters. As to why PW1 did not mention to PW2 the names of those he saw setting fire to the deceased. The learned Senior State Attorney said the record shows that PW2 told him not to do so for security purposes. In all, he prayed on order of retrial be made for interest of justice to both sides.

We have accorded due weight to the arguments by both sides. Involvement of assessors in criminal trials before the High Court is a statutory requirement. Section 265 of CPA is clear on this. That section provides:-

> *"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."*

It is apparent that the role of assessors in criminal trial before the High Court is to aid the court arrive at a just decision. As to how they will discharge such statutory duty, the provisions of section 177 of the Evidence Act provides:-

> *"S. 177. In cases tried with assessors,* ***the assessors may put any questions to the witness*** *through or by leave of the judge, which the judge himself might put and which he considers proper." [Emphasis added].*

On the strength of the above provisions of the law, the assessor's duty is to put up questions but, certainly, they should first seek leave of the presiding judge before doing so. That duty is quite distinct from that done by the prosecution and defence during trial. Section 146(1) of the Evidence Act gives the chronology of events that obtain during trial. It provides:-

> *"S. 146 (1) The examination of a witness by the party who call him shall be called his examination in chief*
>
> *(2) The examination of a witness by the adverse party shall be called his cross examination*

(3) The examination of a witness, subsequent to the cross – examination by the party who called him, shall be called his re-examination."

Since the assessors, under section 265 of the CPA, aids the court to ensure justice is done to the parties and under section 177 of the Evidence Act have the right only to put/ask questions the witness, they are not therefore allowed to examine, cross-examine or re-examine the witnesses which are the exclusive rights vested to the respective parties only as indicated under section 146 (1) of the Evidence Act. There is unbroken chain of authorities, to mention but one, **Chrisantus Mzinga v. Republic,** Criminal Appeal No. 97 of 2015 (unreported) which elaborates that the role of assessors is to aid/assist the court in a fair dispensation of justice. The High Court, during trials as per section 265 of the CPA, is properly constituted when sitting with assessors who should be two or more as the court may deem fit. Assessors, therefore participate in adjudication. They are not allowed to take sides. They must be impartial and should show that when putting questions to witnesses. The presiding judge is obliged to direct the assessors on the type of questions to ask for they are only allowed to seek classifications and elaborations on what the

witnesses will have already told the court during examination-in-chief, cross examination and re-examination:

In the instant appeal, the record of appeal vividly shows that the assessors cross-examined the witnesses for both prosecution and defence. During the prosecution case, assessors asked questions as revealed at pages 19, 22, 26-27, 29, 51, 53 and 54 of the record of appeal.

It is undisputed that the assessors cross-examined the witnesses and both parties agree that a trial is a nullity. They have different views regarding the proper order to be given on the status of the appellant.

We, on our part, fully agree with the views of the learned advocate for the appellant and the learned Senior State Attorney that by assessors cross-examining the witnesses they violated their statutory duty provided under section 177 of the Evidence. They usurped the powers they did not have. In **Mathayo Mwalimu and Another v. Republic,** Criminal Appeal No. 174 of 2008 (unreported)the Court observed:-

> *".... The function of cross-examination is to the exclusive domain of an adverse party to a proceeding".*

Actually by cross-examining the witnesses the assessors abdicated their duty to seek elaborations. They, instead, indulged themselves in asking questions aimed at challenging or contradicting what the witnesses had told the court during examination in chief as was stated in **Mathayo's** case (supra) that:-

> *"....the purpose of cross-examination is essentially to contradict. By the nature of their function, assessors in a criminal trial are not there to contradict. Assessors should not therefore assume the function of contradicting a witness in the case... they are there to aid the court in a fair dispensation of justice."*

In the instant appeal it is therefore clear that the assessors overstepped their responsibility. The inescapable consequences are that they were not fair to the parties. The Court, in **Kulwa Makomelo and two others v. Republic** Criminal Appeal No. 15 of 2014 (unreported) elaborated the consequences of assessors cross-examining witness. It stated as follows:-

".... By allowing assessors to cross-examine witnesses, the court allowed itself to be identified with the interests of the adverse party and therefore, ceased to be impartial. By being partial, the court breached the principles of fair trial now entrenctred in the constitution. With respect, this breach is incurable under section 388 of the Criminal Procedure Act."

All said, we fully agree with the learned advocate and learned Senior State Attorney that, the assessors' act of cross-examining the witnesses constituted a fundamental procedural irregularity. The appellant's trial was therefore a nullity. We, accordingly invoke our revisional powers under the provisions of section 4(2) of the Appellate Jurisdiction Act (AJA), and hereby nullify the entire proceedings of the trial court. The conviction is quashed and sentence set aside.

Last, is the issue whether or not a retrial order be made. As indicated above, the learned Senior State Attorney is of the view that it should be made while the advocate for the appellant is of a different view.

The guideline as to whether or not a retrial order is to be made was well articulated in **Fatehali Manji V. Republic** [1966] E.A. 341 where it was stated that:-

> *"In general a retrial will be ordered only when the original trial was illegal or defective. It will be not ordered where the conviction is set aside because of insufficience of evidence or for purposes of enabling the prosecution to fill up the gaps in its evidence at the trial. Even where 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 shall be ordered; each case must depend on its own facts and circumstances and an order of retrial should only be made where the interest of justice require."*

In the present appeal, the proceedings are a nullity due to the defect caused by the trial court. The prosecution is not to blame. At a glance, the evidence on record shows that PW1 eye-witnessed the incident. The appellant was charged with such a serious offence and, as compared to the

sentence of suffering death by hanging handed down to the appellant the period the appellant has stayed in prison since he was arrested which is just about nine years, the scale of justice still tilts on the need to allow the appellant be retried so as to determine his guilty or otherwise of the offence.

We at the end, find the appellant's trial a nullity. The trial court proceedings are nullified, conviction quashed and sentence set aside. We also order a retrial of the appellant before another judge of competent jurisdiction with a new set of assessors. We so order.

DATED at DAR ES SALAAM this 10th day of August, 2016.

M.S. MBAROUK
JUSTICE OF APPEAL

K.M. MUSSA
JUSTICE OF APPEAL

S.A. LILA
JUSTICE OF APPEAL

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

E.F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL