IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

CRIMINAL APPEAL NO. 212 OF 2014

(CORAM: RUTAKANGWA, J.A., MJASIRI, J.A., And KAIJAGE, J.A.)

KAHEME MANYEMELA @ MANONI ..... APPELLANT
VERSUS
THE REPUBLIC ..... RESPONDENT

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

(De-Mello, J.)

Dated 28th day of April, 2014
in
HC. Criminal Session Case No. 53 of 2010

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JUDGMENT OF THE COURT

2nd & 8th December, 2015
MJASIRI, J.A.:

The appellant Kaheme Manyemela @ Manoni was charged and convicted of the offence of murder contrary to section 196 of the Penal Code, Cap 16 R.E. 2002 (the Penal Code) and was sentenced to death. Aggrieved by the decision of the High Court he has filed his appeal to this Court. The facts leading to his conviction are simple. The High Court relied on the evidence of a single witness, one Mbuke Raphael, PW1. On December 27, 2007 at around 20:00 hours PW1 was at her mother's place at Mhalo Village, Kwimba District within Mwanza Region. The appellant allegedly

accompanied by her maternal uncle Pascal, who is still at large entered her mother's compound, and went straight into her mother's house. She was in the kitchen in a different building in the same compound. When she heard her mother's cry for help, she rushed to her mother's house. Her uncle blocked her entrance into the house and prevented her from calling out for help. By the time she managed to get into her mother's room, her mother was already dead.

At the hearing of the appeal the appellant was represented by Mr. Serapian Kahangwa, learned advocate and the respondent Republic was represented by Mr. Mamti Sehewa, learned Senior State Attorney.

Mr. Kahangwa lodged in Court a one (1) point supplementary memorandum of appeal in addition to that filed by the appellant. It is reproduced as under:-

> *"That identification of the appellant was not that much watertight as the trial court would have us believe to found conviction."*

Before addressing the ground of appeal, Mr. Kahangwa was called upon by the Court to address it on the procedural irregularities on the record of the High Court. Mr. Kahangwa submitted that the court proceedings were

not recorded in compliance with the standard procedure required under the law. The proceedings were not recorded in narrative. He also contended that there is no room for assessors to cross examine witnesses under the law. He made reference to section 290 of the Criminal Procedure Act, Cap 20, R.E. 2002 (the CPA) and section 177 of the Evidence Act Cap 6 R.E. 2002 (the Evidence Act). He stated that the act of cross examination by the assessors is a fatal irregularity which vitiates the proceedings. Mr. Kahangwa submitted that in view of this fatal irregularity, the proceedings should be nullified. Consequently a retrial would usually be ordered by the Court.

Mr. Kahangwa submitted that under the circumstances of this case, it would not be appropriate for the Court to order a retrial. He advanced the following reasons. The prosecution case solely relied on the evidence of PW1 to ground the conviction of the appellant. Her evidence was not clear and was quite contradictory. She did not clearly establish where her uncle, Pascal came from. Despite her allegation that it was Pascal who led the crusade to kill her mother, she listened to him when he asked her not to raise the alarm. When people came to give them assistance, PW1 informed them that she did not know who was responsible for the deed, but when her father came she named Pascal and the appellant. According to Mr.

Kahangwa PW1's evidence left more questions than answers. Though she testified that there was moonlight, the intensity of light was not stated. Mr. Kahangwa argued that the appellant was not properly identified. He relied on the case of **Abdullah Bin Wendo V.** Rex. (1953) 20 EACA 166. According to him the witness may think she has seen something which may not be true. He concluded by stating that the Republic has not discharged the burden of proof. PW1 stated that she knew the appellant before but it had taken nearly a whole year to arrest the appellant. If the appellant was properly identified it would not have taken the police such a long time.

Mr. Sehewa did not support the conviction of the appellant. In relation to the irregularity in recording the proceedings, Mr. Sehewa conceded that the proceedings were not recorded in an acceptable manner in accordance with the requirements under the law. The recording of evidence is required to be in the form of narrative, he submitted.

On the cross examination by the assessors, Mr. Sehewa submitted that it was not proper for the assessors to cross examine the witnesses. Under section 177 of the Evidence Act, the duty of the assessors is to ask questions.

Assessors form part of the court, and cross examination by assessors denied the appellant a fair trial.

With regard to whether or not the appellant was identified. Mr. Sehewa conceded that the evidence on record did not establish that the appellant was properly identified. The requirements for correct identification laid down in the case of **Waziri Amani V. Republic** 1980 TLR 250 were not met. In view of the inadequacy and contradictions of the evidence of PW1, the appellant was not properly identified. Mr. Sehewa submitted that this is not a fit case for re-trial.

We on our part after a careful analysis of the evidence on record and the submissions made by counsel, we are inclined to agree with both counsel. On the procedural irregularities, it is indeed evident that the evidence was not recorded in accordance with the requirements under the law. The procedure is clearly set out under section 210 of the CPA, which applies to trials in the subordinate courts and section 215 of the CPA for trials conducted in the High Court. Section 3 (a) of the Criminal (Record of Evidence) High Court Rules clearly state that the evidence should be recorded in the form of narrative. (G.N.s Nos. 28 of 1953 and 286 of 1956).

In relation to cross-examination by the assessors, we are in agreement with counsel that this is a serious irregularity which renders the whole proceedings a nullity. The assessors being part of the court have no business cross examining the witnesses. This act completely interferes with the principles of fair trial enshrined in Article 13 (6) (a) of the Constitution of the United Republic of Tanzania. The accused is entitled to a fair trial and failure to do so is a breach of one of one of the fundamental principle of natural justice, which is the right to be heard by a fair/unbiased tribunal. In terms of section 265 of the CPA all trials before the High Court are with the aid of assessors. In the course of the trial the judge gave the opportunity to the assessors to cross examine witnesses including the appellant. This was not proper as in a criminal trial assessors are not supposed to cross examine. They ask questions.

The legal positon is provided under the following provisions of the CPA and the Evidence Act.

Section 290 of the CPA provides as follows;-

> *"The witnesses called for the prosecution shall be subject to cross-examination by the accused person or his advocate and to re-examination by the advocate for the prosecution."*

In similar vein section 294 (2) of the Act provides:-

> *"The accused person may then give evidence on his own behalf and he or his advocate may examine his witnesses, if any, and after their cross examination if any, may sum up his case."*

The role of the assessors is clearly provided under section 177 of the Evidence Act.

> *"In cases tried with assessors, the assessors may put any questions to the witness, through or by leave of the court, which the court itself might put and which it considers proper."*

Section 155 of the Evidence Act points out the objective of cross examination. It provides as under:-

> *"155 when a witness is cross examined, he may, in addition to the questions hereinbefore referred to, be asked any questions which tend*
>
> *(a) To test his veracity;*
>
> *(b) To discover who he is and what is his position in life; or*
>
> *(c) To shake his credit, by injuring his character."*

By virtue of their functions, the assessors are not there to contradict. Their role is simply to aid the court in the dispensation of justice. See **Mathayo Mwalimu & another V. Republic;** Criminal Appeal No. 147 of 2008, **Yusuph Sylvester V. Republic; Criminal Appeal No. 174 of 2008** CAT (both unreported).

In the result, we nullify the proceedings of the High Court quash the appellant's conviction of murder and set aside the sentence of death by hanging.

In taking in consideration the submissions by counsel on the nature of the evidence on record, we are faced with the question as to whether or not a retrial is appropriate under the circumstances. On carefully reviewing the evidence on record, we are of the considered view that the evidence on record is not sufficient to ground a conviction. The prosecution relied on the evidence of a single witness, PW1. The identification of the appellant by PW1 did not meet the standards set by **Waziri Amani.** Her evidence was contradictory and she failed to name the appellant at the earliest opportunity. **See Marwa Wangiti Mwita V.** Republic; (2002) TLR 39.

In **Raymond Francis V. Republic** 1994 TLR 202, the Court held that:-

> *"It is elementary that in a criminal case where determination depends essentially on identification, evidence on conditions favoring a correct identification is of utmost importance."*

Given the fact that the identification of the appellant was not watertight, the prosecution has failed to discharge the burden. Under the circumstances we will not order a retrial. The appellant to be released forthwith from prison unless he is otherwise lawfully held.

Order accordingly.

DATED at MWANZA this 7th day of December, 2015.

E. M. K. RUTAKANGWA
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

S. S. KAIJAGE
JUSTICE OF APPEAL

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

E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL