

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: KIMARO,J.A., MUGASHA, J.A., And MZIRAY,J.A.)

CRIMINAL APPEAL NO. 41 OF 2011

CONSTANTINO KAGONJAAPPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the judgment of the High Court of Tanzania at Dar Es Salaam)

(Wambura,J.)

dated 3rd day of June 2010

in

Criminal Sessions Case No. 70 of 2006

.....

JUDGMENT OF THE COURT

29th June & 5th September, 2016

KIMARO,J.A.:-

The appellant was convicted with the offence of murder contrary to section 196 of the Penal Code. He was sentenced to the mandatory sentence for the offence of murder which is death by hanging.

The testimonies of the witnesses in the case show that, the appellant, (Constantino Kagonja) and the deceased, (Haji Mbogoya) were

persons who knew each other. They were involved in a business of paddy rice. They were friends so to say. On 10th January, 2006 Abdallah Ally Kayumu (PW1) was with the deceased at his house at about 7.00 p.m. He also knew the deceased before and they were also friends. The appellant went to the house of PW1 and told the deceased that he should go and see the paddy rice. The deceased and the appellant had earlier on met and the appellant told him that he had paddy rice for sale. PW1 and the deceased met earlier in the morning at a market where they usually buy rice. They parted company for sometime because the deceased had other personal matters to deal with at the village office. It was when they met later at 7.00 p.m. at the house of PW1 when the appellant went there to inform the deceased that he could go and inspect the paddy rice which he had. That was the last time for PW1 to see the deceased alive. PW1 wanted to escort the deceased to the place where the appellant and the deceased had intended to go but they shun him away.

On the next day it was proved that Haji Mbogoya was dead. He was found lying at Madoweni farm, dead, with head injuries. The circumstances of his death were revealed by the appellant himself. He went to a traditional healer known by the name of Shaibu Ally Magugu (PW3). He said he was in

need of money and he thought that the deceased had sufficient funds that would satisfy his needs. He killed him just to realize that the amount he had was very little. Upon the appellant revealing how he killed the deceased, he requested for traditional medicines to protect him from being detected for the killing of the deceased. PW3 tricked the appellant that he should wait while he was preparing the medicines for him. Instead, he phoned the police. The police sent F 1415 Detective Sergeant George (PW4) who went and arrested the appellant. With a view of proving what the appellant told PW3 before PW4 went to PW3, PW3 told the appellant to repeat what made him go to PW3. The appellant thinking that PW4 went to PW3 for similar problems he repeated to PW3 in the presence of PW4 that he was the one who killed the deceased. He also revealed the reasons for the killing to PW3. PW4 heard the appellant telling PW3 that he was seeking for protective traditional medicines to prevent his arrest for the killing.

The appellant admitted in his defence knowing the deceased and that he was his friend. He said the deceased went at his business kiosk on 10th January 2006 and requested him to escort him to Maburukis where he intended to see certain persons. However, they did not find them there. They returned and parted, each one going to his own house. The appellant

denied causing the death of the deceased. The post mortem examination report (Exh.P2) shows that the deceased died because of cut wounds. He had serious cut wounds on the head. As for the rest of the appellant's defence, it was on his arrest.

The learned trial judge was satisfied that the evidence led by the prosecution proved that the appellant was the one who intentionally killed the deceased. He was thus convicted and sentenced to suffer death by hanging.

Aggrieved, the appellant filed on his own, thirteen grounds of appeal. Mr. Henry Chaula, learned advocate assigned to represent him, filed five supplementary grounds of appeal.

When the appeal was called on for the hearing, the appellant appeared in person. Mr. Henry Chaula learned advocate also appeared to represent him. Ms. Jenifa Masue, learned State Attorney represented the respondent Republic.

Because of an error which is apparent on the face of the record we will not deal with the grounds of appeal. We noted irregularities in the proceedings and we required the learned State Attorney and the learned

advocate to address the Court on the irregularities. When reading through the proceedings of the trial in the record of appeal, we noted that at pages 13, 16, 20, 29, 53 and 59 the assessors who sat with the learned trial judge while conducting the trial of the appellant did not properly exercise the right conferred to them when putting questions to the witnesses.

Section 265 of the Criminal Procedure Act, CAP 20 R.E. 2002 says that all trials in the High Court have to be conducted **with aid of assessors**.

The section reads:

"All trials before the High Court shall be with aid of assessors the number of whom shall be two or more as the court thinks fit."

The section is specific on the purpose of having assessors. They are there to assist the trial judge. They must play an active role in the trial. Their participation in the trial is guided by section 177 of the Law of Evidence Act, [CAP 6 R.E.2002]. They are required to take full participation in the trial only to the extent of assisting the trial court to make a just and fair decision in the case. They are not required at any stage of the trial to take sides with any of the parties in the trial. The section reads:

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

It is the trial judge who must guide the assessors on the questions which they ask and to control them so that they do not ask questions which go outside their role.

In the case of **Ramadhani Seifu @ Baharia and two others V the Republic** Criminal Appeal No. 221 of 2010 (unreported), the Court held that:

"By their nature and function, assessors in criminal trials are not there to contradict. Their role is to aid the Court in a fair dispensation of justice. Assessors should not, therefore assume the function of contradicting a witness in a case. They should only ask him/her questions."

When the learned advocate and the learned State Attorney were asked by the Court to address it on the propriety of the questions that were asked by the assessors, they both conceded that the assessors went out of their

roles and cross-examined the witnesses instead of asking questions in the areas where they did not understand the witnesses.

On our part, we agree with the learned State Attorney and the defence counsel. In the case of **Augustine Ludaru V Republic** Criminal Appeal No. 70 of 2010 (unreported) the Court held that:

*“The role of the assessors is to assist the court to arrive at a just decision...One, the Court to avail the assessors with adequate opportunity to put questions to the witnesses. **Through questions the assessors will help the court to know the truth.**”* (Emphasis added).

We would like to take the questions asked by Assessor Mwanahawa Hemedi Mgaya, one of the assessors to show the irregularity we are talking about. Page 15 of the record of appeal contains the testimony of Mariam Likunge (PW2). Her evidence in examination in chief was to the effect that on 10th January 2006 at about midnight she heard the dogs barking. She woke up and heard someone saying “*yala nakufa*”. She woke up her husband and told him what she had heard. She did not know where the

voice was coming from. They stayed awake for a long time until it was day time. There was no cross-examination by the defence counsel nor re-examination by the prosecuting State Attorney on the evidence of this witness. But Assessor Mwanahawa Mgaya was permitted to put to PW2 questions whose answers were as follows:

“My husband looked around the house but did not notice anything unusual. Many people used to farm and return to the village. We were the first to move to the area. I did not identify the deceased. I knew the deceased before his death. He was wearing a blues jeans and shirt. They were all similar he had wounds on the head and on the hands. The wounds were caused by a bush knife. (upanga) I also saw bicycle tyres. I only heard after some days that one person had been arrested for causing the death. I do of know that person.” (Emphasis added).

The nature of questions asked by the Assessor Mwanahawa Hemedi Mgaya, were in a form of cross examination. She stepped into the shoes of Mr. Sikalumba, learned advocate who represented the appellant in the trial. Yet the learned judge in the process of composing the judgment included in the judgment the cross examination that was done by the said assessor. At page 101 while analyzing the evidence of PW2 she said:

"She woke up her husband who looked around the house but could not detect anything which was unusual."

PW2 did not say in her examination in chief by Mr. Kalunga learned State Attorney who was conducting the prosecution in the trial court that when he informed her husband about the person who was saying in agony that "yala nakufa" her husband went outside and looked around the house and noticed nothing unusual.

In the case of **Ramadhani Seifi @ Baharia** (supra) remarked that:

"It is clear from the said provision (section 177 of the Law of Evidence Act) that, in the course of testimony by witnesses, assessors have the duty to put

questions and not otherwise. Putting questions in our view is quite distinct from the function of cross examination. The object of cross examination is to contradict, impeach the accuracy, credibility and general value of the evidence given in chief; to sift the fact already stated by the witness, to detect and expose discrepancies or to elicit suppressed fact which will support the case of cross-examining party. We think that this is not what is anticipated in a criminal trial conducted with aid of assessors"

The type of questions asked by Assessor Mwanahawa to PW2 was repeated by herself and the rest of the assessors in respect of all the witnesses who testified in the trial. As conceded to by the learned State Attorney and the learned advocate, that was wrong. This Court has repeatedly held that the sanctity of the impartiality of the courts generally must be respected and protected. People litigating upon their rights must get assurance that justice will always prevail whenever the courts determine on any person's rights. This includes guiding the assessors properly and not

letting them to interfere with roles played by the parties or their advocates in the litigation.

In this case fair justice was not done because the assessors went outside their limits and assisted the parties instead of assisting the trial judge. We would also like to remind the learned trial judges that it is their duty to control and guide the assessors in playing their role. They should not let them exercise authority over matters which are not concerned with them. This will serve the time of the court and the parties as well as the costs for conducting trials. Non-compliance with the procedure prescribed as was done in this case results in fatal irregularities which cannot be cured. The proceedings were a nullity.

Given the pointed out irregularity, we have no option but to declare the trial a nullity. Using the powers conferred on us by section 4(2) of the Appellate Jurisdiction Act, CAP 141 R.E.2002 we quash the proceedings from the time the trial started to the stage of the judgment and the sentence that followed. We order the trial to start afresh before another judge with different assessors. The offence in this case is alleged to have been committed on 10th January 2006. The appellant has been under confines for a long period. This is the sixteenth year in custody. It is

important that the case should be determine at the earliest possible time.

It is accordingly ordered.

DATED at DAR ES SALAAM this 26th day of August, 2016.

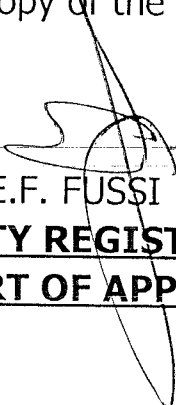
N.P. KIMARO
JUSTICE OF APPEAL

S.E.A. MUGASHA
JUSTICE OF APPEAL

R.E. MZIRAY
JUSTICE OF APPEAL



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


E.F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL