THE STATE
versus
BLESSING KUNAKA
and
JOSHUA CHIBONDA

HIGH COURT OF ZIMBABWE
BHUNU J
HARARE, 23 February 2014 and 26 February 2014
and 1 June 2014 and 30 April 2014 and 29 July 2014 and 6 August 2014 and
22 September 2014 and 5 November 2014 and 13 November 2014
and 30 April 2014 and 27 January 2019

Assessors: 1. Mr Gonzo (Deceased)
2. Mr Tutani (Deceased)

Criminal trial

V. Munyoro, for the State
P. Makuvaza, for the 1st accused
M. Baera, for the second accused

BHUNU J: Both accused stand charged with murder as defined in s 47 of the Criminal Law Codification and Reform Act [*Chapter. 9:23*]. The accused persons are alleged to have murdered the deceased one Delight Musiiwa at Beatty Farm, Chegutu in the course of a robbery.

The trial commenced on 23 July 2014. I presided over the case with two assessors Mr Gonzo and Mr Tutani. The trial progressed to judgment stage. Both assessors however fortuitously passed away before judgment could be delivered.

Upon being advised that both assessors had passed on, counsel for the State Mr *Munyoro* was of the mistaken view that Mr Barwa one of the assessors at the High Court who is still alive was one of the assessors who had presided in this case. He undertook to go and

verify the actual position. This resulted in a length delay in having the matter set down. The delay was also compounded by my ascension to the Supreme Court bench in 2015.

It appears the matter was almost forgotten without any feedback from the State. It was only reset down for hearing on 30 April 2019. At that hearing Mr *Munyoro* was still of the view that one of the assessors was still alive. I then decided to hold an enquiry and called Mr Barwa to the hearing. When questioned, he denied having been part of the panel of assessors in this case. His denial was consistent with the record of proceedings which indicates that Mr Barwa is not one of the assessors in this case. It is only then that State counsel conceded that infact Messrs Gonzo and Tutani were the correct assessors for this case but have since both passed away.

The issue which immediately arose was what is to be done if both assessors die before judgment and finding on aggravating circumstances. Counsel graciously undertook to research and file heads of argument on the issue. There have been no divergent views on the effect and course of action to be taken by the court in the event of both assessors passing away before judgment and findings on extenuating circumstances in the event of conviction.

I now proceed to answer the question as to what is to be done in the event of both assessors dying before judgment is passed and a finding on extenuating circumstances. It is trite that a court can only validly adjudicate over a matter if it is properly constituted according to law. The composition of the High Court in criminal matters is prescribed in terms of s 3 of the High Court Act [*Chapter. 7:06*]. It provides that, for the purpose of hearing a criminal trial, the Court is properly constituted if it consists of one judge of the High Court and two assessors.

Section 8 of the Act provides for an exception allowing the proceedings to continue where one of the assessors dies or is incapable of continuing with the trial. It provides as follows:

> "**Incapacity of assessor in criminal trial**
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> (1) If at any time during a criminal trial in the High Court one of the assessors dies or becomes, in the opinion of the judge, incapable of continuing to act as assessor, the judge may, if he thinks fit, with the consent of the accused and the prosecutor, direct that the trial shall proceed without that assessor.
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> (2) Where the trial proceeds in pursuance of a direction given in terms of subsection (1), the decision of the court shall be unanimous.
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> (3) If, in the circumstances referred to in subsection (1)—

> (*a*) the judge does not, in terms of that subsection, direct that the trial shall proceed without the assessor referred to in that subsection; or
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> (*b*) the court is unable, as required by subsection (2), to agree on a decision on any charge in the indictment; the accused, unless already on bail, shall remain in custody and may be tried again:
>
> Provided that a judge of the High Court may, in terms of Part IX of the Criminal Procedure and Evidence Act [*Chapter 9:07*], release the accused on bail.
>
> (4) If the court is unable, as required by subsection (2), to agree on a decision on any charge in the indictment and the accused is again tried on such charge, the judge and the assessor who were members of the court which failed to agree as aforesaid shall not be competent to be members of any subsequent Court constituted to try the accused on that charge".

While the Act provides for the continuation of a criminal trial with one assessor, it is silent on what is to be done where both assessors are dead or unavailable for one reason or another. Silence in this respect can only mean that the legislator intended a criminal trial in this Court to proceed with at least one assessor after commencing with two assessors. The import of s 3 as read with s 8 of the Act is that it is not permissible for a criminal trial in this Court to proceed without at least one assessor. This is so because the role of assessors is crucial in the determination of issues of fact. Thus the law maker has decreed it inappropriate for a judge to determine issues of facts in serious criminal matters without the aid of at least one assessor.

In *S* v *Nqobile Sibanda* SC 4/08 it was held that a murder trial ends with the judge and assessors making a finding on extenuating circumstances (*now aggravating circumstances*). In this case it is common cause that the trial has not terminated as it has not reached the termination stage. There are still outstanding factual issues to be determined, thereby necessitating the presence of at least one assessor. Both assessors now being unavailable on account of death, the court is no longer properly constituted for the purposes of continuing with the trial.

Having come to that conclusion, the only viable way forward is for the Court to invoke its inherent jurisdiction to control its process, quash these proceedings and order a trial *de novo.*

It is accordingly ordered that:

1. The current proceedings in this matter be and are hereby quashed and set aside.

2. That the matter be and is hereby referred for a trial *de novo*.

National Prosecuting Authority, State's legal practitioners.
Kuwaza and Mukoko Attorneys, 1st Accused's legal practitioners.
Baera and Company, 2nd Accused's legal practitioners.