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Unhelpful assessors throw life-line for murder convict

By Carmel Rickard

THE courts in Tanzania still interpret the law to mean that the death penalty is mandatory in the case of murder, but it is decades since last anyone was hanged. As the numbers on death row increase, judges in those courts remain scrupulous in ensuring that all the elements of a fair trial are observed in cases potentially involving capital punishment. Take the case of Hilda Innocent, convicted of murdering her husband. Tanzania's highest court found certain safety nets had not been put in place during her trial – the assessors, who were appointed to assist the judge in her case, had not participated properly. As a result the trial was nullified and a new trial must now take place.

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Read Hilda Innocent vs Republic here [1]

HILDA Innocent was charged with murdering her husband in 2014. During 2017, after a full trial, she was convicted and "sentenced to suffer death by hanging". Her lawyers then brought a multi-pronged appeal against conviction and sentence. Even before those grounds were addressed by the parties, however, three judges of Tanzania's highest court raised a problem of their own: even though the law clearly says that "all trials" before the high court have to involve assessors, the assessors sworn in during Innocent's case played no role at all for much of the proceedings. Could it be said that the assessors "participated fully as required by law", they asked.

Innocent's legal representatives were quick to grab what might turn out to be quite literally a lifeline thrown by the court. The assessors were not helped to participate fully from the start of the trial as the law demanded, they said. The record did not show that the judge explained their role to them at the start of the trial. Nor did they ask a single question of the first three prosecution witnesses. This was a "fundamental" irregularity, they argued, and contravened the law on how assessors were supposed to engage in a high court trial. As they only started to participate at the middle of the case, they would have been hampered in giving a proper opinion to the judge at the end of the evidence.

Innocent's counsel therefore urged the court to throw out the conviction, set aside the death sentence, and order a retrial before another judge and other assessors.

The prosecution tried to minimize the problem. Though it was "not indicated" whether the judge had even explained to the assessors their role and responsibility, still this was not fatal as "it is a rule of practice and not a rule of law". Failure by the judge to brief the assessors and their failure to participate fully in asking questions of the first group of witnesses did not cause any injustice to the accused, they said.

Faced with this contradiction, the appeal court said it could not be doubted that the participation of the assessors in the trial "left much to be desired" in complying with the law.

At least two assessors must be involved in all Tanzanian high court trials. Unlike SA courts where assessors,

if they sit, are generally retired magistrates or experienced lawyers, assessors in Tanzanian trial seem to be ordinary members of the public, acting almost like a residual jury. Part of the Criminal Procedure Act, for example, says that “all persons between the ages of 21 and 60 years shall be liable to serve as assessors”. And the Tanzania Evidence Act says that assessors “may put any question to the witnesses, through or by leave of the judge, which the judge himself might put and which he considers proper.”

In Innocent’s appeal the judges said there was no doubt that in any high court trial involving assessors their full participation was a “necessity” rather than a formality, and a judge had to make sure that they were involved “at every stage”. There were also binding decisions making clear the important role that assessors were expected to play in a trial. These included a 1990 appeal court decision that said assessors had the task of “helping” a trial judge. To do this they should put their questions and express their opinions. The full involvement of assessors in a trial was an essential part of the process, the court had said, and “its omission is fatal, (rendering) the trial a nullity.”

In Innocent’s case three assessors were sworn in, but for some time they played no role. Even once they started to participate this was still not “substantial” and the appeal judges questioned whether they had been properly informed by the judge of what they were supposed to do.

If the court simply ignored the fact that the assessors played virtually no role for much of the trial, or if it ignored the evidence of witnesses who were not questioned by the assessors, this would defeat the law’s mandatory requirements.

The appeal judges concluded: “In the end, we are left with no other option (than to) nullify the proceedings and the judgment of the trial court, quash conviction and set aside the sentence of death imposed”. They also ordered a retrial before a different judge and assessors, adding that since Innocent had been in custody for four years already the retrial should be held as quickly as possible.

If she is again sentenced to death, Innocent will join more than 500 people on death row in Tanzania, at least 20 of whom are women. The death penalty continues to be imposed by the courts there although the last person executed was in 1994. The death penalty is regarded as appropriate only for treason and murder. However, while judges have interpreted the law to mean that in cases of treason it is not mandatory, they continue to consider that in cases of murder they are obliged to sentence the convicted person to death. Academic studies suggest that most Tanzanian prosecutions for murder end in with a manslaughter verdict.

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