IN THE COURT OF APPEAL OF TANZANIA

AT IRINGA

(CORAM: MBAROUK, J.A., MASSATI, J.A., And ORIYO, J.A.)

CRIMINAL APPEAL NO. 259 OF 2011

BRAYSON S/O KATAWA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Njombe (Iringa Registry)

(Uzia, J.)

dated 18th day of November, 2010.

in

Criminal Session Case No. 32 of 2009

JUDGMENT OF THE COURT

22nd & 29th March, 2012.

ORIYO, J.A.:

The appellant, Brayson Katawa, was sentenced to death consequent upon his conviction of the murder of FAINES d/o MSALIKWA, on or about 6th December, 2005 at Idunda-Mlevela Village within Njombe District, Iringa Region.

The Post Mortem Examination Report which was produced and admitted in evidence at the trial showed that the death was due to DEEP STAB WOUND OF THE ABDOMEN. And in his summary of the report, Doctor Meshack Nyagawa (PW1), who performed the post mortem, observed that there was:-

"a severed spleen and intestines and massive bled(sic) blood inside the abdomen.

The brief facts of the case are based on the events of the night of 6/12/2005. It was alleged in the trial High Court sitting at Iringa that while the deceased was peacefully sleeping in her home, the appellant invaded her and threatened to kill her if she did not give him money or at least a chicken. It was alleged that the appellant was holding a spear in one hand and a lighted candle in another. When the deceased failed to give him any of the two, the appellant allegedly struck the deceased with the spear in the stomach, left it there and vanished. The deceased

was hospitalised to treat the injuries until when she died on 2nd January, 2006.

The appellant was subsequently arrested and formally arraigned in the trial court where he pleaded not guilty.

The appellant was aggrieved by the conviction and sentence of death by hanging imposed on him by the trial court. Mr. Onesmo Francis, learned advocate who also advocated for the appellant at the trial filed three grounds of appeal as follows:-

1. The trial judge erred in law and fact in disregarding the defence of **alibi** allegedly that it was an afterthought.

2. The trial judge erred in fact by believing the evidence of visual identification while the alleged crime was committed in such horrible conditions at night.

3. The trial judge erred in fact in believing and acting on the evidence of dying declaration while it was tainted by the fact that the appellant was a person of bad character.

The learned counsel for the appellant argued the three grounds of appeal **seriatim** and prayed that the appeal be allowed.

Mr. Edson Mwavanda, learned State Attorney for the respondent/Republic did not support the appeal.

In response, the learned State Attorney, and with leave of the Court, drew the Court's attention to some irregularities in the way the Preliminary Hearing was conducted in the trial court. He contended that the learned trial judge did not comply with the mandatory requirements of section 192(3) of the Criminal Procedure Act, (the Act). He submitted that the inference of

non-compliance with the said provision is that the provisions of section 192 (4) of the Act could not come into play. He concluded that in the circumstances, the Preliminary Hearing was irregularly conducted and the proceedings thereof rendered illegal. Mr. Mwavanda invited the Court to exercise its powers of revision under section 4 (2) of the Appellate Jurisdiction Act to expunge the Preliminary Hearing proceedings from the record. Further, he prayed for a retrial, if it will serve the interests of justice. He referred us to the cases of **Athumani Ndagala @ Mikingamo vs. Republic**, Criminal Appeal No. 63 of 2007 (unreported) and **M.T. 7479 Sgt. Benjamin Holela vs Republic**, [1992] TLR 121.

Mr. Francis, learned counsel, submitting in response to the alleged irregularities in the Preliminary Hearing, contended that section 192 (3) of the Act was not contravened at all. He was firmly opposed to a retrial because in his view, it would prejudice his client.

In order to appreciate the situation at the trial court, we have to go back to the record to ascertain what the learned State Attorney referred to as irregularities in the proceedings. The trial court in this case conducted a Preliminary Hearing on 13/11/2009 when Mr. Mgavilenzi, learned State Attorney presented a detailed outline of the facts of the case against the appellant. At the end thereof the following transpired:-

"**Mr. Mgavilenzi**: We pray to tender the Postmortem Report if the defence counsel has no objection.

"Signed

Judge"

Mr. Onesmo: Madam Judge, we don't have any objection

Court: The Postmortem Report is admitted as Exhibit P1.

"Signed

Judge"

Mr. Mgavilenzi: The accused was arrested and upon interrogation he denied to have caused the death of the deceased. He further claimed that on the material date he was in Songea. That's all.

"Signed

Judge"

13/11/2009

Then the learned Judge asked the

Accused:- Which facts do you admit?

Mr. Onesmo:- We admit the following:-

1) the accused is a resident of Idunda Mlevela, 28 years old, Christian and a peasant.
2) The accused's name is Bryson Katawa; Osama is not his name.
3) That, when the offence was committed the accused was in Songea.

4) That the accused was arrested and charged with an offence of murder which he has pleaded not guilty.

5) All other facts are disputed.

That is all.

"signed

Judge"

13/11/2009

That was the totality of what transpired at the Preliminary Hearing. Then the learned Judge prepared a Memorandum of Undisputed Matters as hereunder:-

MEMORANDUM OF MATTERS NOT IN DISPUTE.

1. That the accused is a resident of Idunda – Mlevela Village 28 years old, Christian and peasant.

2. That the accused's name is Bryson Katawa and Osama is not his name.

3. That when the offence is alleged to have been committed, he was in Songea.

4. That the accused was arrested and charged with the offence of murder which he has pleaded not guilty.

5. All other facts are denied.

Court: The court has read over the memorandum of matters not in dispute to the accused.

"Signed

Judge"

Signatures

For the Republic 1. Mr. Mgavilenzi

2. Miss Maziku

Defence Counsel Mr. Onesmo

Judge: JUDGE

The learned State Attorney complained that section 192 (3) and (4) of the Criminal Procedure Act and Rule 6 of the Accelerated Trial and Disposal of Cases Rules, 1988 were not observed in the trial court.

Section 192 (3) provides:-

> *"(3) At the conclusion of a preliminary hearing held under this section, the Court* ***shall prepare a memorandum of the matters agreed and the memorandum shall be read over and explained to the accused in a language that he understands, signed by the accused and his advocate (if any), and by the public prosecutor and then filed.***
>
> [Emphasis is supplied].

(4) ***Any fact or document admitted or agreed*** *(whether such fact or document is mentioned in the summary of the evidence or not) in a memorandum filed under this section* ***shall be deemed to have been duly proved****;....."* [Emphasis is ours].

On matters admitted at the Preliminary Hearing, in terms of section 192 (3) of the Act above, this Court had occasion, in a similar situation in the case of **M. T. 7479 Sgt. B. Holela v. Republic** (supra) to make the following observation:-

"it is obvious from those provisions that the contents of the memorandum have to be read and explained to the accused, and ***that duty is mandatory****. The record of the trial proceedings however does not indicate*

compliance with this duty. We take it that there was non-compliance."

[Emphasis is supplied].

Rule (6) of the Accelerated Trial and Disposal of cases Rules, 1988 provides:-

"When the facts of the case are read and explained to the accused, the Court shall ask him to state which of those facts he admits and the trial magistrate or judge shall record the same."

According to the record it appears that after the learned judge had prepared the Memorandum of Undisputed Facts, three signatures were appended at the bottom thereof. These were two signatures for the Republic and the third one was the signature of the defence counsel, Mr. Onesmo Francis. The signature of the accused person is missing.

That was followed by the List of Witnesses and Exhibits intended to be tendered at the trial. We have failed to see from the record of the case that after the contents of the Memorandum of Undisputed Facts were read over to the accused they were also **explained to him in the language he understood**, in compliance with subsection (3) of section 192 of the Act.

In our view, the trial court in the instant case did not comply with the requirements of the law. The trial court was duty bound to ensure that the Agreed Facts are read over and explained to the accused in the language he understood and the fact that it has been done, should be reflected in the record. What was to follow then was for the court to require the accused to state which of those facts he admitted and the trial court would then record the facts admitted by the accused.

The obtaining practice in many trials, is for the defence counsel to step into the shoes of the accused. Statements are, in

most cases, made by defence counsel on the facts agreed by the accused, which is contrary to the dictates of the law.

In **Holela's** case (supra) the Court commented on this practice of advocates playing the role of accused persons in the following words:-

> "*It is apparent that a statement by counsel or advocate for the accused to the effect that the matters raised are admitted is not sufficient under the law.* ***It is the accused himself who must indicate what matters he or she admits****. In cases where the matters comprise documents, the contents of the documents must be read and explained to the accused, in the event of a sketch plan or such like documents, the sketch plan must be explained and shown to the accused to ensure that he or she is in a*

position to give an informed response."

[Emphasis is ours].

See also the Court's decisions in **Efraim Lutambi v. Republic**, Criminal Appeal No. 30 of 1996 (unreported).

It is not in controversy that section 192(3) of the Act, was not complied with during the Preliminary Hearing. **Firstly**, the Memorandum of Agreed Matters was not read over and explained to the appellant in a language he understood, as required. **Secondly**, his signature was not appended at the end of the Memorandum. **Thirdly**, his defence counsel stepped into his shoes and told the court what matters were admitted and what matters were not admitted.

In view of all these procedural irregularities, we have asked ourselves whether they are fatal to the entire proceedings or merely part of the proceedings have been vitiated. It is now settled law that the procedural irregularities in a trial as in this

case, vitiates only part of the proceedings affected; that is, the Preliminary Hearing, in the instant case. See, for instance the cases of **Benjamin Holela** (supra), **Christopher Ryoba v. Republic**, Criminal Appeal No. 26 of 2002; **Kallist Clemence @ Kanyaga v. Republic**; Criminal Appeal No. 19 of 2003, **Athumani Ndagala @ Mikingamo vs Republic**, Criminal Appeal No. 63 of 2007, [all unreported] to mention just a few.

Now we come to the crucial issue of excluding the proceedings in the Preliminary Hearing of this case. Generally, the effect will be different depending on the circumstances of a particular case; but the exclusion is bound to have some adverse effects on either party [see **Athumani Ndagala**, (supra)].

The effect of nullifying proceedings of a preliminary hearing means that all the evidence that the parties thought was deemed proved in terms of section 192 (4) of the Act, will now have to be proved in the ordinary way.

In this case, the appellant will have to tender evidence in Court to prove his sole defence of **alibi** he had put up, that is, when the murder occurred at Idunda-Mlevela Village, he was away in Songea working in farms as a casual labourer.

If we proceed with the hearing of the appeal as urged by both learned counsel, the result will be that there would be nothing left to consider nothing for the defence as the trial was completed without affording the appellant an opportunity for him to demonstrate his **alibi**. Certainly this will be nothing but a traversity of justice.

Our minds have immensely exercised on what could be the best way out in the present situation. We have toyed with the idea of a retrial and we have revisited the principles applicable in deciding whether or not to order a retrial as laid down in the case of **Fatehaii Manji vs Repulic**. [1966] EA 343 where it was stated:-

"In general a retrial may be ordered only where the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for purposes of enabling the prosecution to fill in gaps in its evidence at the first trial.....each case must depend on its own facts and an order for retrial should only be made where the interests of justice require it."

We think, the circumstances of this case and the interests of justice dictate that there be a retrial. In the trial court the appellant also had put up a notice during the preliminary hearing that he was going to rely on the defence of **alibi** in terms of section 194 (4) of the Criminal Procedure Act. That defence was part of the Memorandum of Undisputed Facts and therefore no

evidence was required to prove it. If the preliminary hearing proceedings are expunged, it might prejudice the appellant because he will now be required to prove the defence of **alibi**.

In view of the procedural irregularities committed in the trial High Court during the Preliminary Hearing we find the preliminary hearing proceedings to be illegal. We have taken into account the facts and the circumstances of the present case and we are satisfied that due to the seriousness of the offence, the interests of justice require that there be a retrial so that the appellant also receives a fair trial. In the event, we are constrained to exercise the revisional powers of the Court under section 4 (2) of the Appellate Jurisdiction Act, Cap 141, R.E. 2002, as we hereby do and revise the proceedings, quash the conviction for murder and set aside the death sentence. We order a retrial to be conducted expeditiously and before a different judge and a new set of assessors.

We so order.

DATED at **IRINGA** this 28th day of March, 2012.

M. S. MBAROUK
JUSTICE OF APPEAL

S. A. MASSATI
JUSTICE OF APPEAL

K. K. ORIYO
JUSTICE OF APPEAL

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

(J. S. Mgetta)
DEPUTY REGISTRAR
COURT OF APPEAL