IN THE COURT OF APPEAL OF TANZANIA

AT BUKOBA

(CORAM: RUTAKANGWA, J.A., KIMARO, J.A., And LUANDA,J.A.

CRIMINAL APPEAL NO. 416 OF 2013

JEREMIAH JOHN
REVELIAN KAGYA
MASUMBUKO PAULO ..... **APPELLANTS**
JAMES MAJURA
ANGELO BURCHADI

VERSUS

THE REPUBLIC..... RESPONDENT

(Appeal from the Conviction and Sentence of the High Court of Tanzania at Bukoba)

(Khaday, J.)

dated the 27th day of November, 2013

in

Criminal Sessions Case No. 54 of 2009

JUDGMENT OF THE COURT

09th and 19th day of February, 2015

RUTAKANGWA, J.A.:

The family of one John and his wife Regina John of Kianga Village Kaisho, in Karagwe District, was blessed with eleven (11) children. Among these were Jeremiah John (*the 1st appellant*), Aaron John, and Abel John who was the youngest of all the siblings. All are still alive except Abel.

On the morning of 24th May 2006, the dead body of Abel John (the deceased) was found lying by the roadside at Kyaruhuza area, Kaisho. The police at Kaisho police post were informed of the incident. Uncertain of the cause of death, the police promptly arranged for an autopsy to be carried out. This was done on the same day commencing at 12.00hrs, to be specific, when "*putrefaction*" was yet to start.

The doctor who conducted the autopsy opined that the cause of death, which had occurred less than 24hours earlier, was "respiratory failure secondary to damage of phrenic nerve".

The findings of the autopsy were summarized as follows by the *"Medical Practioner":-*

"SUMMARY OF REPORT:-

1. *DISLOCATION OF THE CERVICAL SPINE WITH COMPRESSION OF THE PHRENIC NERVE AT C 3 & C 4.*

2. *MULTIPLE BRUISES AND LACERATIONS OF UPPER LIMBS, BACK, BUTTOCKS, SHOULDERS AND SCALP AND LOWER LIMBS."*

Suspecting foul play, given the rumours making rounds at the village, the police mounted criminal investigations. The investigations led to the arrest of the five appellants on divers dates, who were then believed to have murdered the deceased.

Consequent upon the completion of all the mandatory preliminary legal requirements, the five appellants were formally arraigned before the High Court sitting at Karagwe on 10th February, 2010. When the information was read over to the appellants, each one of them entered a plea of not guilty. Immediately thereafter, a preliminary hearing was held as demanded by section 192 of the Criminal Procedure Act, Cap 20 (*the CPA*) and the Rules made thereunder (GN.NO. 192 OF 1988) (the Rules). Because we are of the settled mind that the proceedings of the said preliminary hearing may prove very crucial in the determination of this appeal, we have found it absolutely pertinent to reproduce here the entire proceedings.

The conduct of the said hearing after the appellants' pleas had been taken was as follows:-

*"**COURT:** Entered as Pleas of NOT Guilty in respect to all accused. The State Attorney reads out the facts of the case as contained in the facts sheet, which has been enclosed to form part of these proceedings.*

Sigd. V. K.D. Lyimo

JUDGE

10/2/2010

***S/A Continues**: In the course of the investigations, a Post Mortem Report was issued. We pray to tender the Post Mortem Report as exhibit.*

***Mr. Katabalwa Advocate:** No Objection.*

***Court:** Post Mortem Report marked and admitted as P1.*

***S/A Continues:** The Police visited the scene and drew a Sketch plan of the scene of crime. We pray to tender the Sketch plan as exhibit.*

***Mr. Katabalwa Advocate:** No Objection.*

Court: *Sketch plan marked and admitted as exhibit P2.*

S/A Continues: *The accused persons were arrested. During the investigations the first accused volunteered a cautioned statement in which he admitted to have participated in the arresting of the deceased person. And that he was with the co- accused. We pray to tender his cautioned statement.*

Mr. Katabalwa Advocate: *We object. Let it be at the trial.*

Court: *Objection upheld.*

S/A: Continues: *Following completion of investigation all the accused were formally arrested and charged.*

Court to accused: *Facts are correct.*

Signitures:

Accused 1- Jaremiah s/o John Sdg.....

Accused 2- Revelian s/o Kagya Sdg.....

Accused 3 - Masumbuko Sgd.....

Accused 4 -James Majura *Sgd.....*

Accused 5- Angelo Burchard *Sgd .....*

S/Attoney – Komba *Sgd.....*

Mr. Katabalwa Advocate *Sdg.....*

Sigd. V. K.D. Lyimo

JUDGE

10/2/2010".

Thereafter it was ordered that the trial would commence on a date to be fixed.

The trial of the appellants started on 7th November, 2013, the learned trial judge being different from the one who had conducted the preliminary hearing. Also counsel for both the prosecution and the defence were different.

At the trial, seven (7) witnesses testified for the prosecution while the defence had nine (9) witnesses in all. We have all the same found the evidence of PW1 Aaron John, PW3 Regina John and PW6 Rwechungura Kiranga against the appellants, on the face of it, to be the most damning.

The most convenient starting point in summing up the prosecution case, is the fleeting assertion by PW3 Regina that "Before that material day, Jeremiah came to me and complained that the deceased was stealing food crops from his shamba. Jeremiah went to pick a letter from the police in order to arrest the suspect – Abel". By "before that material day" the witness was referring to the "night of 24th of May" of the year she had forgotten. The logical nexus to this assertion, on the facts leading to the arrest of the appellants, was seemingly provided by PW1 Aaron.

According PW1 Aaron, on the morning of 23rd May, 2006 around 11.00 hours, he was with the deceased riding a bicycle going to Ibale village. Along the way they met with the 1stappellant who unequivocally told the deceased that "...*subiri leo utakipata, utakiona.*" In essence, the 1st appellant was warning the deceased that he was up for trouble that day. After that threat PW1 Aaron and the deceased apparently parted company. PW1 Aaron "decided to go Kianga Village" instead, while the deceased proceeded to Ibale. After a short distance, PW1 Aaron met Masumbuko Paulo (3rd appellant) and Angelo Burchadi (5th appellant) who joined the company of the 1st appellant. On his part he proceeded to Kianga and returned home at 18.00 hours.

In the meanwhile, according to PW3 Regina, at about 17.00 hours, the 1st appellant, in the company of "Majaliwa, Angelo, Reverian, Melchior, Kamugisha, Rugo and others" had called at her residence armed with sticks and clubs looking for the deceased whom they had allegedly seen running into her house. She told them that he was not there. Not convinced, they physically searched for him in the house and on missing him, "*left without him.*" It was the following morning that she was informed about the death of her beloved son. PW3 Regina was categorical in her evidence that she "did not see anyone beating" the deceased. Nevertheless she said that she believed the appellants murdered Abel.

As to what happened in between the time when Jeremiah and his party left PW3 Regina's residence and the following morning, PW6 Rwechungura purported to supply the answer. PW6 Rwechungura was at the material period a teacher. His duty station was Ndagara Secondary School. Not only that, he was also a half – brother of the deceased and Jeremiah, sharing the same father.

According to PW6 Rwechungura, on the material day (23/5/2006) at about 18.50 hours as he was leaving the residence of the 1st appellant Jeremiah, he met the latter at the gate. Jeremiah was accompanied by "Angelo Burchard, a Chairman of Kitongoji, Masumbuko Paulo, Reverian Barthlomew, Kamugisha Majura, Serapion Mathayo, Melchior Joseph Barangai, Rugo Martin, Jackson Kalisa and Respicius Mutaigwa." All of them were holding the deceased who was tied with a rope. Then he eye witnessed the 1st appellant hitting the deceased on the head with an iron bar, and the "deceased started bleeding through the nose." He then conveniently left the place without reporting the brutal incident to anybody and subsequently learnt of the death of the deceased the following day at 16.00 hours. Although he learnt of this death that early, he recorded his statement to the police on **7th November 2007**. The reason he assigned for this one and a half year delay was that he had unsuccessfully visited the police station thrice to have his statement recorded, although he conceded while under cross-examination that "Aaron had his statement recorded shortly after the incident."

The appellants gave sworn evidence. Each one not only vehemently denied complicity in the murder or killing of the deceased but challenged

the evidence of the PW1 Aaron, PW3 Regina, PW4 Bernard Kiranga, PW6 Rwechungura and PW7 Venant Aloys which was placing them at the alleged scene of crime and /or its environs on the material day.

The 1st appellant, while conceding to have obtained a warrant from Kaisho police post for the arrest of the deceased on 10th March, 2006, claimed to have given it to the 2nd appellant for its execution. He further testified that he had no hand in the alleged arrest of the deceased on 23/05/2006 as he had left for Bukoba town and Mutukula on a business trip on 22/05/2006 and returned on 26/05/2006 to learn of the death of his young brother while at Omulushaka.

The 2nd appellant who was a "Kitongoji" Chairman, told the trial High Court that indeed the 1st appellant had given him the police letter authorizing the arrest of the deceased. He thereafter sought to arrest the deceased at the home of PW3 Regina on 11th March 2006. He failed to arrest him as he escaped and he never saw him again alive. He saw his dead body along the road on 24/05/2006. When he went to report the matter at Kaisho police post on the same day, he found PW1 Aaron recording his statement and was arrested as a suspect. His wife DW7

Lucretia supported his alibi claiming that her husband was with her at home throughout on 23/5/2006 and never ventured out at all. The rest of the appellants equally raised the defence of alibi and each called a witness to fortify his respective defence. The 5th appellant, for instance, emphatically asserted that he had left for Ngara District on 25/03/2006 and returned to Kianga village on 08/07/2006, where he lived thereafter as a free person until **May, 2009**, when he was arrested in connection with the murder of Abel.

The three assessors who aided the learned trial judge were unanimous in their opinion. They returned verdicts of not guilty. The opinions of the 2nd and 3rd assessors are worth reproducing here. They were as follows:-

> ***"2nd assessor:*** *All accused are not guilty. Abel was a suspect. He might have been murdered by other persons. Circumstantial evidence that was adduced before this court falls short of proof.*
>
> ***3rd assessor:*** *The accused are not guilty. Evidence adduced before the court could not show how the*

deceased was murdered. PW1 said the deceased was stabbed twice. However, PW5 said that the deceased was strangulated. Now the question is, who is telling the truth. I opine that the accused be acquitted as they are innocent."

It is obvious that the unanimous verdict of the assessors and their supporting reasons did not melt the heart of the learned trial judge. She differed with them and assigned her reasons for that. While she was not convinced that PW2 Audax, PW4 Bernard and PW7 Venant were witnesses of truth, she singled out PW1 Aaron, PW3 Regina and PW6 Rwechungura to be credible witnesses whose evidence coupled with the fact that "the deceased died from unnatural causes" proved the guilt of the appellant to the hilt. The finding that "the deceased died from unnatural causes" was premised on the findings of the Medical Practioner as depicted in the Report on Post-mortem Examination (Exh.P1). The appellants were accordingly found guilty of the murder of Abel John as charged, convicted and sentenced to suffer death by hanging. Aggrieved by the conviction and sentence they have preferred this appeal.

Before us, the 1st,2nd, 3rd and 5th appellant were represented by Mr.Chamani Al-Muswadiku, learned advocate, while Mr. Josephat Rweyemamu, learned advocate, appeared for the 4th appellant. The respondent Republic was represented by Mr. Athumani Matuma, learned State Attorney.

Mr. Chamani preferred to approach the Court with only two grounds of complaint against the decision of the trial court. These were:

"1. *THAT, the trial Court erred in law and fact to rely on the prosecution evidence which did not prove the charge beyond reasonable doubt.*

2. *THAT, the trial Judge did not adequately consider the defence of the appellants such as an alibi and their behaviour after the incidence" (sic).*

On his part, Mr. Rweyemamu not only challenged the soundness in the law of the judgment of the trial High Court, but also the propriety of the preliminary hearing. For this reason, he came to this Court with six (6) grounds of appeal. Briefly, these were as follows:-

(i) *The trial judge erred on the facts in convicting the 4th appellant, James Majura as he was never mentioned at all by any witness being seen participating in the crime.*

(ii) *The trial judge wrongly misdirected the assessors in his (sic) summing up and in her judgment by making a wrong assertion that the 4th appellant had indeed admitted in his defence that the names of "KAMU OR KAMUGISHA" were his names.*

(iii) *The preliminary hearing was irregularly conducted in that the memorandum of undisputed facts was not drawn at all.*

(iv) *The trial judge misdirected himself (sic) on question of identification in respect of the 4th appellant.*

(v) *The trial judge totally failed to address herself on the question of credibility of the prosecution witnesses.*

(vi) *The trial judge unjustly disregarded the defence of alibi raised by the 4th appellant.*

Both learned counsel zealously addressed us at length in elaboration of their respective grounds of appeal, some of which definitely overlap.

The respondent Republic, through Mr. Matuma, supported the appeal of all the appellants save for the 1st appellant. It was his contention that since all of the appellants had set out to effect a lawful arrest on the strength of the previously issued arrest warrant they had no common intention to cause grievous harm on the deceased. The said brutal assault which eventually led to the death of Abel, he argued, was carried out single-headedly by the 1st appellant without the participation of his co-appellants. He accordingly urged us to uphold his conviction and death sentence, but quash the conviction of the rest and set aside the death sentence imposed on them.

We have gone through the entire proceedings in the trial High Court as well as the impugned judgment and counsel's oral submissions. We are increasingly of the view that this appeal can be easily disposed of without canvassing each and every ground of complaint.

The common ground of complaint to the effect that the appellants were not given a full hearing, in that their defence evidence was not considered at all, and where it was, not adequately, affords us a good starting point of our discussion. We are of this view because our Constitution, in Article 13 (6) (a), compels all courts to give accused persons a fair or full hearing when determining their rights. It is now settled law that this duty is not discharged when the court does not consider either at all or adequately, the defence case.

The law is equally established that failure to consider the defence case is fatal and usually leads to a conviction being quashed: see, for instance:-

(a) ***LOCKHART V.R.*** *[1965] E.A.211,*

(b) ***OKOTH OKALE V. UGANDA*** *[1965] E.A.555,*

(c) ***ELIAS STEVEN V.R.,*** *[1982]T.L.R 313,*

(d) ***SIZE PATRICK V.R.****, Criminal Appeal No. 19 of 2010 (unreported), etc.*

We may as well point out clearly, for the avoidance of doubt that at the time of **LOCKHART'S** decision, the duty to give an accused person *"a fair hearing"* was yet to become a constitutional imperative.

The complaint that the appellants were not fairly tried is not far-fetched. It is borne out by the record. As we have already succinctly shown above, each appellant not only raised a defence of alibi but also called a witness to support it. Quite surprisingly in her summing up to the assessors the learned trial judge said:

> *"That the defence of alibi that was raised by DW1 and DW5 that they were in Bukoba and Ngara respectively* ***has not cast doubt against the prosecution case.*** *In that, much as DW6 and DW7 had respectively supported the accused persons, no exhibit was tendered to substantiate that the two were actually on journey hence away from their respective places of residence.* ***That other defence witnesses had general denial of the***

commission of the offence" *(see page 85 of the record of appeal). [Emphasis is ours].*

In her judgment (at pg. 144) the learned trial judge says:-

"Regarding defence evidence as hinted before we have defence of alibi from DW1 AND DW5. In that, they were not only at their Village but they were also out of Karagwe District".

Furthermore, at page 146 of the record, she asserts thus:-

"Apart from DW1 and DW5 who had raised defence of alibi, ***the rest of the accused persons have general denial that they never involved themselves in murdering the deceased."*** *[Emphasis is ours.]*

From the above extracts two clear crucial points emerge. Firstly, the learned trial Judge, contrary to law, was casting a duty on the 1st and 5th appellants to prove their respective defence of alibi. Secondly, the defence of the 2nd, 3rd and 4th appellants, which rested entirely on the defence of alibi, was not considered at all.

That the learned trial judge never considered the defence case is further demonstrated by these two obvious facts. One, that the alibi of the 1st appellant was not only supported by his wife DW6 Reveriana, but also by the 3rd appellant. DW3 Masumbuko unequivocally told the trial court (page 31) that at the time of Abel's death, the 1st appellant was not at the village as **"he was on safari".** The 1st appellant had a right to have this piece of exculpating evidence considered even if it were eventually to be rejected. Were this evidence considered, could it have changed the stance of the learned judge on the genuiness of the 1st appellant's defence of alibi? The answer to this crucial question remains anybody's guess. Two, there was a controversy, which is the subject of Mr. Rweyemamu's ground of appeal, on whether the 4th Appellant is the same person as "KAMU or KAMUGISHA". The learned judge appears to have obtained its solution from the horse's mouth (i.e. James Majura). Both in her summing up to the assessors (pp.86-7) and judgment (pp. 133-4), the learned trial judge boldly held that:-

> *" At the first, the court was not sure as to whether the 4th accused person's name was James Majura as appears on the information charge sheet, or is Kamu or Kamugisha*

Majura as it has been referred to by the witnesses. ***However, the doubt seems to have been ironed out by the accused person himseif. In that, during defence, he said aii are his names".*** *[Emphasis is ours.]*

It was Mr. Rweymamu's submission, that the 4th appellant never made the admission attributed to him. It was his further strong contention that the trial judge *"lacked objectivity in her approach"* and *that"* the misdirection did prejudice" her. Having failed to glean an iota of evidence from the record going to support this conclusion by the learned judge, we have respectfully found ourselves constrained to agree with the sentiments of Mr. Rweymamu. The 4th appellant never admitted the name of Kamu or Kamugisha at all in his evidence.

From the above discussion it is eminently clear that the learned trial judge did not consider at all in her evaluation, the defence case of the 2nd, 3rd and 4th appellants and/or adequately and objectively that of the 1st and 5th appellants, as correctly urged by Mr. Chamani and Mr.Rweymamu. This omission was as fatal as it was incurable. It denied

all the appellants, their constitutional right to a fair trial. We have, therefore, no flicker of doubt in our minds that justice was not done to them in the case. This finding alone would justify our nullification of the appellants' trial. But before doing so, we shall have to say something on the other complaint touching on the conduct of the preliminary hearing.

The second complaint rests on non compliance with the mandatory requirements of s.192 of the C.P.A and the Rules made thereunder. Section 192 (1), (3) and (4) reads as follows:-

"(1) Notwithstanding the provisions of section 229, if an accused person pleads not guilty the court shall as soon as is convenient hold a preliminary hearing in open court in the presence of the accused or his advocate (if he is represented by an advocate) and the public prosecutor to consider such matters as are not in dispute between the parties and which will promote a fair and expeditious trial.

(2) N.A.

(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.

(4) Any fact or document admitted or agreed (whether such fact or document is mentioned in the summary of evidence or not) in a memorandum filed under his section shall be deemed to have been duly proved; save that if, during the course of the trial, the court is of the opinion that the interests of justice so demand, the court may direct that any fact or document admitted or agreed in memorandum filed under this section be formally proved."

It is further provided as follows in Rules 4 and 6 of the Rules:-

"4. The person prosecuting shall in every trial under these rules, prepare as clearly as possible, the facts of the case which shall be read to the accused and explained in a language he understands.

5. N.A.

6. 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."

It is undisputed law that compliance with the above cited provisions of the law is a mandatory duty, where a preliminary hearing is held. This Court in **MT. 7479 BENJAMIN HOLELA V.R.** (1992) T.L.R. stressed that:-

"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 matter he or she admits. In cases where 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."

See also **EFRAIM LUTAMBI V.R** [2000] T.L.R. 265, among many others. The rationale for this is not far to find. This is because it is an accused person who is on trial and not the advocate.

In our present case, as shown at the outset of this judgment, the trial High Court purported to conduct a preliminary hearing envisaged under the C.P.A and the Rules. But as it must by now be obvious to all, there was substantive non-compliance with the requirements of the law. Although the necessary facts do not form part of the record before us, we shall assume that they were actually prepared and read out to the appellants. Our concern here is that, going by the record, the accused persons (appellants), were not individually asked to state which of those facts they admitted. As if adding insult to injury, the appellants were neither asked whether they had any objection to the tendering of the two documents (the Report P.M. Examination and the sketch plan) nor and more devastatingly for the prosecution, were their contents read over and explained to them. They were, therefore, partly convicted on the basis of evidence concealed from them by the trial court.

In a further flagrant violation of the provisions of s.192 (4) of the CPA, no memorandum of agreed matters was drawn at all. This inexplicable omission rendered the provisions of s. 192 (4) inapplicable at the trial of the appellants. We accordingly expunge from the record both exhibits P1 and P2 as correctly urged by both learned counsel for the appellants and ultimately unavoidably conceded by Mr. Matuma. In the absence of the Report of P.M. Examination, we are left with no clear cut answer on the cause of death of the deceased, a dilemma rightly pointed out by the 3rd assessor.

We are alive to the fact that it is *"settled law that homicide can be proved without first establishing cause of death,"* per the Court in **JUMA JUMA MOHAMED V.D.P.P.** Criminal Appeal No. 243 of 2011, following **MATHIAS BUNDALA VR,** Criminal Appeal No. 62 of 2004 (both unreported). All the same, we realize that this is an exception rather than a rule. Each case, therefore, must be judged on the basis of its own particular facts and circumstances.

Mr. Matuma argued confidently and forcefully that despite expunging the Report on P.M. Examination, the conviction of the 1st appellant is unassailable on the basis of the credible evidence of PW1

Aron, PW3 Regina and PW6 Rwechungura and particularly the latter. We have given mature consideration to his forceful argument but we have respectfully found ourselves resolutely disagreeing with him. We took this stance because, one, he never considered the fact that the evidence of PW3 Regina who admitted not witnessing any of the appellants assaulting the deceased was based on mere suspicion. It is trite law that a suspicion, however strong, cannot be a substitute for proof beyond reasonable doubt. Two, even assuming without accepting for the moment that PW1 Aaron was a truthful witness, his evidence does not prove, even on the plane of conjecture, the cause of death stated by PW5 D./Sgt. Novert or on the Report on P.M. Examination. His evidence is silent on which part of the deceased body he saw the injuries from which he *"was bleeding profusely."* The findings of P.M. Examination show vividly that apart from the *"Dislocation of cervical spine with compression of phrenic spine with compression of phrenic nerve," the "skull and its contents"* and all other body parts were *"intact"*. That being the case where is the basis of the claim by both PW1 Aaron and PW6 Rwechungura that the deceased was bleeding profusely at the time they allegedly saw him each one at a different spot? These doubts become stronger when one considers the fact that none of them led

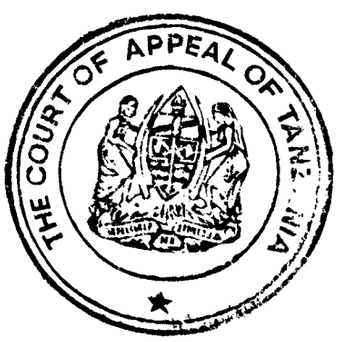
anybody to the spots where each one of them claimed to have eyewitnessed the appellants assaulting the deceased, where at least drops of the said blood would have been located and may be samples taken. In the light of these unresolved crucial questions, the absence of the evidence of the doctor who examined the dead body of Abel renders the cause of his death only a matter of conjecture. Under the circumstances it would be risking taking to assume, let alone to hold, that the deceased died as a result of the alleged hit on the head by the 1st appellant as gallantly argued by Mr. Matuma. In the absence of medical evidence it cannot be held with any degree of certitude that it was the alleged blow on the head which caused the death of the deceased, as Mr. Matuma would wish us to believe and hold relying on his lay opinion from the bar.

From the above discourse, it is increasingly obvious that the laxity in the holding of the preliminary hearing has robbed us of the vital evidence which would have established beyond reasonable doubt the deceased's cause of death and its connection with the appellants or any one of them. This also, in our considered opinion, occasioned a failure of justice in the case and this time on the side of the prosecution. These

findings make it unnecessary on our part to canvass the remaining grounds of appeal.

Having held that there was pervading failure of justice which materially adversely affected the entire trial, we are compelled to allow this appeal. We accordingly quash the conviction for murder and set aside the death sentence. Given the nature of the case and the fact that neither party is to blame for these unfortunate fatal irregularities, we order an immediate retrial of the appellants before another judge and fresh assessors.

DATED at BUKOBA this 18th day of February, 2015.



E.M.K.RUTAKANGWA
JUSTICE OF APPEAL

N.P.KIMARO
JUSTICE OF APPEAL

B.M.LUANDA
JUSTICE OF APPEAL

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

E. Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL