IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

(CORAM: MASSATI, J.A., MUSSA, J.A. And MWARIJA, J.A.)

CRIMINAL APPEAL NO. 369 OF 2015

EMMANUEL CHARLES @ LEONARD.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Tabora)

(Mgonya, J.)

Dated the 27th day of March, 2015

In

Criminal Session No. 163 of 2012

JUDGMENT OF THE COURT

22nd & 29th April, 2016

MUSSA, J.A.:

In the High Court of Tanzania, Tabora Registry, the appellant was arraigned and convicted for murder, contrary to section 196 of the Penal Code, chapter 16 of the Revised Laws (the penal code). Upon conviction, he was handed down the mandatory death sentence (Mgonya, J.). The factual setting giving rise to the arrest, arraignment and the ultimate conviction of the appellant may briefly be recapitulated:-

During the trial, the prosecution sought to establish that on the 23rd May 2010, at Namalandu Village, within Bukombe District, the appellant murdered a certain Kundi Sahani whom we shall henceforth simply refer to as "the deseased." The appellant refuted the accusation, whereupon the prosecution featured two witnesses and two documentary exhibits to buttress its allegation. Incidentally, the case for the prosecution was wholly comprised of the appellant's cautioned and extra-judicial statements which were, respectively, recorded by No. F1568, Detective Corporal Erick (PW1) and Peter Reuben (PW2). Both statements were adduced into evidence without demur from the defence.

In both statements the appellant confessed involvement in the killing of the deceased. In a nutshell, the appellant stated that he is a peasant resident of Nyakayondwa village Chato District. He further revealed that he has a sister, namely, Sofia Charles who resides at Nyamonge village, Bukombe District, with her husband named Mapuji Shabani. The latter, he said, is actually, the deceased's son. The appellants' account was to the effect that on the 12th May, 2010 he was summoned by his sister and brother-in-law to attend an urgent engagement at their home. The

appellant obliged the call and, upon arrival at Nyamonge, his sister and brother –in-law jointly informed him that the deceased was a witch and that she was in the act of practising her evil magic powers against them. It was resolved there and then that the deceased should be killed and that the appellant and Mapuji were to perpetrate the act jointly by the use of machetes. The appellant was promised a rake-off sum of Shs 300,000/= in the event the heinous activity was successfully carried out.

True to their unholy plan, on the 23rd May, 2010, around 1:00 a.m. or so, the appellant and his brother in law invaded the residence of the deceased, each armed with a machete, and hacked the deceased to death. The appellant was then paid as promised and, soon after, he departed for Nyakayondwa Village. A good deal later, he was informed that his brother-in-law had been arrested but he did not know how his predicament ended. According to his cautioned statement, the appellant was arrested at Namalandura Village, Bukombe District, on the 9th March 2012, that is, close to two years in the aftermath of the fateful incident. He was, accordingly, arraigned and that concludes the prosecution version which was unveiled during the trial.

In his reply, the appellant completely disassociated himself from the prosecution accusation. He discounted the cautioned statement by saying that he was forced to confess by PW1 who interviewed him at gun point. As regards the extra-judicial statement, the appellant claimed that he was forewarned by PW1 that he (PW1) will either break his (appellant's) legs or kill him if he did not confess before the justice of the peace. Thus, against that back drop, he similarly confessed before PW2. The appellant insistently told the trial court that the deceased was killed by a certain Gervas who was arrested but he (appellant) did not know how the matter involving Gervas ended. The appellant pleaded innocence and, having said so, he rested his defence.

On the whole of the evidence, the learned trial Judge was fully satisfied that the appellant perpetrated the act of killing the deceased and that he did so with malice aforethought. In arriving at the foregoing finding, the Judge entirely relied upon the cautioned and extra-judicial statements which were, incidentally, the only evidence featured by the prosecution in support of its accusation. Having so found, the trial court proceeded to convict and sentence the appellant to the extent as we have

already indicated. The appellant is aggrieved by both the conviction and sentence upon a memorandum of appeal which is comprised of three points of grievance, namely:-

1. *That, while evidence and testimonies from both the prosecution and defence were taken without administering oaths to the witnesses then the learned trial judge erred in law and fact to convict and sentence the Appellant basing on such evidence.*
2. *That, the learned trial judge erred in law in her findings leading to conviction and sentencing the Appellant which findings was reached without assessing, evaluating and considering the Appellant's defence evidence in the judgment.*
3. *That, the learned trial judge erred in law to conduct trial in violation of fundamental principles of fair trial, to wit:-*

a) That, the cautioned statements of the Appellant Exhibit P. 1 were not read in court.

b) That, in summing up no guidance to the assessors was ever given by the trial judge, only narrated the facts of the case, prosecution case and defence case.

c) That, the Appellant's trial were conducted without affording him his right to object to the assessor(s) who participated in the trial.

d) That, it is not known as to whether there were any examination in chief, (if any) by who, in the mode the prosecution witnesses gave testimonies in court, neither is it known as to who cross-examined."

From the adversary side, the respondent Republic questions the competency of the appeal upon a Notice of a Preliminary point of objection which goes thus:-

" The appeal is incompetent before this court for failing to comply with Rule 68 (2) and (7) of the

Tanzania Court of Appeal Rules of 2009 as also stated in Criminal Appeal No. 234 of 2013 in ***KAGOMA RENALO @ LABAN AND ANOTHER Vs. REPUBLUIC CAT*** *at Tabora (unreported). The respondent therefore will pray that this appeal be struck out."*

At the hearing before us, the appellant was represented by Mr. Musa Kassim, learned Advocate, whereas Mr. Miraji Kajiru, learned State Attorney stood for the respondent Republic. For reasons that will become apparent at a later stage of our judgment, we deemed it convenient for the parties to argue both the preliminary point of objection and the complaints raised in the appeal.

Arguing the preliminary point of objection, Mr. Kajiru submitted that the appellant's Notice of Appeal is defective for not indicating the nature of the sentence which was meted out by the trial court. The requirement to so indicate the nature of the sentence, he said, is imperatively laid down under the provisions of Rule 68 (2) of the Tanzania Court of Appeal Rules, 2009 (the Rules). To that extent, Mr. Kajiru further charged, the Notice of

Appeal is vitiated and since in terms of Rules 68 (1) of the Rules it is the Notice of Appeal which institutes a criminal appeal, the appeal itself has been rendered incompetent.

To this submission, Mr. Kassim conceded, albeit grudgingly, that the defect is fatal. On the main appeal, the learned counsel for the appellant abandoned the last two grounds and concentrated his efforts on the first ground of appeal. Submitting on the ground, Mr. Kassim contended that from the record of the evidence, it is very clear that both the prosecution witnesses as well as the appellant were neither sworn nor affirmed before their evidence was recorded. The learned counsel for the appellant further submitted that the non-compliance was in breach of section 198 (1) of the Criminal Procedure Act, Chapter 20 of the Revised Laws (the Act). Mr. Kassim urged us to discount and expunge the evidence of PW1, PW2 as well as that of the appellant. Having done so, he concluded, the record is left with no evidence whatsoever and, in the circumstances, the entire proceedings below should be nullified and there should be a new trial before another Judge and a new set of assessors. Mr. Kajiru entirely

subscribed to the foregoing submissions and, as it were, he did not wish to gild the lily.

Having heard the concurrent learned arguments on the two contentious issues, we propose to first address the preliminary point of objection. To express at once, the issue need not detain us, much as, upon a plethora of decisions, it is now settled that in terms of Rules 68 (2) of the Rules, for a Notice of Appeal to be valid, it must *inter alia*, imperatively, indicate the nature of the conviction, sentence, order or finding of the High Court against which it is desired to appeal (see, for instance, Criminal Appeal No. 268 of 2006 – **Majid Goa Vedastus vs. The Republic**; Criminal Appeal No. 432 of 2007 – Emmanuel **Andrew Kanengo Vs. The Republic**; and Criminal Appeal No. 130 of 2010 – **John Petrol Vs. The Republic** (all unreported). As correctly formulated by Mr. Kajiru it is a Notice of Appeal which institutes a criminal appeal and, thus, an invalid Notice like the one at hand cannot be said to have instituted a competent appeal. We are, accordingly, constrained to uphold the preliminary point of objection to the effect that the purported appeal before us is incompetent.

Having upheld the respondent's point of objection, we would have, ordinarily, proceeded to strike out the appeal forthwith and the matter would have ended there. However, as we shall shortly demonstrate, this matter entails some peculiar and exceptional circumstances which compel us to refrain from following that path. Fortunately, the peculiarity of the matter under our consideration cannot be farfetched.

When urging us to nullify the proceedings, Mr. Kassim drew our attention to the omission, by the trial Judge, to swear or affirm all the witnesses including the appellant. That is what happened and, indeed, we entirely subscribe to the submission of the learned counsel for the appellant, much as the omission was a contravention of section 198 (1) of the Act which stipulates:-

> " *Every witness in a Criminal cause or matter shall, subject to the provisions of any other written law to the contrary be examined upon oath or affirmation in accordance with the provisions of the Oath and Statutory Declaration Act."*

In the course of construing the foregoing provision, the Court made the following observation in the unreported Criminal Appeal No. 63 of 2014 – **Mwami Ngura Vs. The Republic**:-

> *"... if in a criminal case, evidence is given without oath or affirmation in violation of section 198 (1) of the CPA such testimony amounts to no evidence at all..."*

The situation at hand is further complicated by the fact that the omission involved all witnesses which is why, we should suppose, counsel from either side urged us to nullify the entire proceedings.

Thus, if we refrained from striking out this appeal it was with a purpose: So that we remain seized with the High Court record and take the opportunity to revise the obvious impropriety obtaining in the proceedings. Conversely, if we had taken the option of striking out the appeal without more, the irregular proceedings of the court below would have remained intact and, no doubt, the shortcoming would have been perpetuated and could have operated to impede the appellant if he was minded to refresh his quest to impugn the decision of the High Court.

We happily note that this is not the first time the Court has adopted this approach in order to remedy a situation. This Court thus acted in corresponding circumstances in Criminal Application No. 6 of 2012 – **DPP Vs. Elizabeth Michael Kimemeta @ Lulu,** Civil Application No. 109 of 2008 – **Tanzania Heart Institute Vs. The Board of Trustees NSSF**; and Civil Application No. 151 of 2008 – **Chama Cha Walimu Tanzania Vs. The Attorney General** (all unreported). In the latter decision, the Court observed:-

> *"Because the proceedings before the Labour Court were a nullity that is why we felt constrained not to strike out this application. We did so in order to remain seized with the Labour Court's record and so be enabled to intervene suo **motu** to remedy the situation."*

Similarly, in the situation at hand, the court is confronted with an incompetent Notice which desires to impugn proceedings which are themselves a nullity. To remedy the situation, the course to revision is inevitable.

When all is said and done, as we have already intimated, the trial Court's proceedings are seriously undermined by the omission to swear or affirm the witnesses. Accordingly, we are constrained to nullify the entire proceedings of the High Court by invoking section 4(3) of the Appellate Jurisdiction Act, Chapter 141 of the Revised Laws. In the end result it is ordered that there should be a new trial before another Judge and a new set of assessors. In the meantime the appellant should remain in custody to await the resumption of trial.

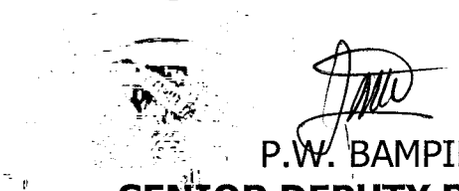
DATED at **TABORA** this 29th day of April, 2016.

S.A. MASSATI
JUSTICE OF APPEAL

K.M. MUSSA
JUSTICE OF APPEAL

A.G. MWARIJA
JUSTICE OF APPEAL

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



P.W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL