IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: MBAROUK, J.A., LUANDA, J.A. And JUMA, J.A.)

CRIMINAL APPEAL NO. 133 OF 2015

1. BAHATI PASTORY @ GWANCHELE
2. PETER JOHN } **.....APPELLANTS**

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Mwanza)

(Bukuku, J.)

dated the 10th day of February, 2015

in

Criminal Sessions No. 81 of 2014

JUDGMENT OF THE COURT

23rd & 26th May, 2016

JUMA, J.A.:

On information filed in the High Court at Mwanza by the Director of Public Prosecutions, the appellants, BAHATI PASTORY @ GWANCHELE and PETER JOHN were together with two others, charged with the offence of murder contrary

to sections 196 and 197 of the Penal Code, Cap 16 R.E. 2002. The particulars of the offence levelled against the four accused persons were that on 15th day of December, 2013 at Kisesa village within Magu District in Mwanza Region, they murdered one CLEMENT GREGORY @ MABINA (the deceased).

At the Preliminary Hearing on 10th February, 2015, the first and second appellants pleaded not guilty but after the narration of the memorandum of facts, Mr Sayi, the learned counsel who represented the two appellants and their co-accused, informed the trial High Court that the two appellants before us were offering to plead guilty to the lesser offence of manslaughter. Ms Ajuaye, the learned State Attorney who was representing the Republic had no objection to the proposed change of plea. When the charge of manslaughter contrary to section 195 of the Penal Code was read to the appellants, they both gave a similar response that: *"It is true, I killed but without the intention to".*

The learned State Attorney then read out the facts to the appellants. During the narration of facts, Mr Sayi expressed no objection when the prosecution tendered the two cautioned statements which the appellants recorded to the police (exhibits P2 and P3). Similarly, no objection was raised when the learned State Attorney offered to exhibit two extra judicial statements (exhibits P4 and P5) which the two appellants made to the justice of the peace.

The trial court found the appellants guilty, and stated that:

> *"...the accused persons have today pleaded guilty to the lesser offence of manslaughter. I thus find them guilty for the offence of manslaughter c/s 195 and 198 of the Penal Code.*
>
> *Sgn: Hon. A.E. Bukuku,*
>
> ***JUDGE***
>
> ***10/2/2015"***

The two appellants were found guilty and each was sentenced to serve fifteen years in prison.

Feeling aggrieved with the sentence passed by the trial court, the two appellants have come to this Court. Bahati Pastory @ GWANCHELE (the first appellant) has put forward three grounds of appeal and these are:

> *1. THAT, the trial High Court Judge erred in law and fact in sentencing the appellant a sentence which is manifestly excessive in the circumstances of this case.*
>
> *2. THAT, the trial High Court Judge erred in law and fact by failure to consider the mitigation factor before reaching the decision.*
>
> *3. THAT, the trial High Court failed judicial duty to show the reason which led to it to impose the impugned sentence.*

Peter John, the second appellant has preferred three grounds to contest his sentence:

1. That the trial court erred in law and fact in sentencing the appellant a sentence which is manifestly excessive in the circumstances of this case.

2. That, the trial High Court Judge erred in law and/facts by failure to consider the mitigation factor before reaching the decision.

3. That, the trial court failed in its judicial duty to show the reason which led to imposing the impugned sentence.

The brief background to this appeal may be gleaned from the summary of facts which was narrated by the prosecution when a lesser charge of manslaughter was preferred against the appellants. The deceased owned a tract of land which was also subject of frequent encroachments by other people who quarried for building stones from that same land. On the day he met his violent death, the deceased sent out his 15 workers to put up notices to warn off all those people who trespassed into his land. But his workers were

chased off by the people living around the tract of land. After learning that his workers had been chased off, he went personally to the scene.

He was not spared either. The irate mob began to attack him with stones and sticks. In self-defence, the deceased took out his pistol and began to fire warning shots into the air as he was running away. Tragically, one of the bullets hit one boy causing his instant death. The mob became even angrier. They caught up with the deceased. He was hit with stones and sticks. The deceased died from his injuries. As the body of the deceased lied down in death, his pockets were ransacked and his wallet and mobile phone were all stolen. The post-mortem examination determined that his death was caused by severe haemorrhage.

When the appeal came up for hearing before us, Mr. Serapion Kahangwa, learned advocate appeared for the first appellant while Mr. Deocles Rutahindurwa, learned advocate

appeared for the second appellant. Mr. Juma Sarige learned Senior State Attorney represented the respondent/Republic.

Before the learned counsel could address us on the grounds of appeal, we *suo motu* raised two issues of law, which we wanted them to submit on as a preliminary matter. **Firstly**, we pointed out although the record shows that the learned State Attorney had read out what is described as "facts in summary", the record does not show if the two appellants were individually or collectively asked whether they agreed, or disputed the facts as a whole or any part of the facts narrated by the learned State Attorney. **Secondly,** we referred to page 9 of the record of the appeal where, after finding the two appellants guilty *"for the offence of manslaughter c/s 195 and 198 of the Penal Code"*, the learned trial Judge did not proceed to convict the appellants before imposing the sentence.

Mr Kahangwa, learned counsel for the first appellant agreed with the *suo motu* observation made by the Court that indeed the trial Judge did not enter any conviction after finding the two appellants guilty. Failure to convict before imposing the sentence, he submitted, violates the provisions of section 282 of the Criminal Procedure Act, Cap 20. He urged us to send the case back to the trial court with an order for that court to enter the mandatory conviction before imposing the sentence.

While associating themselves to what Mr Kahangwa has submitted on, both Mr Rutahindurwa and Mr. Sarige, urged us to return the case file back to the High Court. Mr Rutahindurwa preferred the return to another trial Judge because in the circumstances of this case where the appellants were not given the chance to express their views on the narrated facts, the appellants should take fresh pleas before a different Judge because the existing facts are tainted, he

submitted. Mr Sarige asked us to nullify all the proceedings including the sentence.

On our part, we think this Court has through its several decisions including **Nagunwa Peter @ Tyson vs. R.,** Criminal Appeal No. 152 of 2014 (unreported), approved the procedures to be followed when accused persons plead guilty, and also admit facts read out by the prosecution before a conviction is entered— as was laid down by the East African Court of Appeal in **Adan v. R** [1973] E.A. 445. The East African Court of Appeal stated:

> *"When a person is charged, the charge and the particulars should be read out to him, so far as possible in his own language, but if that is not possible, then in a language which he can speak and understand. The magistrate should then explain to the accused person all the essential ingredients of the offence charged.* ***If the***

accused then admits all those essential elements, the magistrate should record what the accused has said, as nearly as possible in his own words, *and* ***then formally enter a plea of guilty***. *The magistrate should* ***next ask the prosecutor to state the facts of the alleged offence*** *and,* ***when the statement is complete, should give the accused an opportunity to dispute or explain the facts or to add any relevant facts***. *If the accused does not agree with the statement of facts or asserts additional facts which, if true, might raise a question as to his guilt, the magistrate should record a change of plea to "not guilty" and proceed to hold a trial. If the accused does not deny the alleged facts in any material respect, the magistrate should record a conviction and proceed to hear any*

further facts relevant to sentence. The statement of facts and the accused's reply must, of course, be recorded. "[Emphasis added].

Although the above passage referred to magistrates, trial judges should also follow the same procedure. With the decision of the East African Court of Appeal in **Adan v. R** (*supra*) as a guide, we note that after the substituted charge of manslaughter had been read out to the two appellants, the learned trial Judge properly proceeded to record what the two appellants had actually said in their own words—"*Ni kweli, niliua bila kukusudia*". Next, and we think properly so, the trial Judge formally enter a plea of guilty to the charge of manslaughter. However, we think that the trial Judge went astray and committed a fatal irregularity when, after the State Attorney had narrated the facts, the trial Judge failed to afford the two appellants an opportunity to dispute or explain the

facts or to add any relevant facts to what the State Attorney had narrated.

The denial of the appellants' right to accept, vary, add or dispute the statement of facts violated the well-established practice outlined in **Adan v. R** (*supra*) which this Court has adopted as its own.

Despite failing to give the appellants the opportunity to dispute the facts which the prosecution narrated, the learned trial Judge committed another fundamental irregularity of proceeding to mitigation and sentencing without so much as convicting the two appellants:

> *"**Court:** The accused persons have today pleaded guilty to the lesser offence of manslaughter. I thus find them guilty for the offence of manslaughter c/s 195 and 198 of the Penal Code.*
>
> *Sgn: Hon. A.E. Bukuku*

JUDGE

10/2/2015"

For the procedure governing trials before the High Court, there is a statutory duty requiring the trial High Court, after recording the plea of GUILTY of the accused, to convict thereon. This statutory duty is provided for by section 282 of the Criminal Procedure Act, Cap 20 R.E. 2002 (CPA):

> ***282.****-If the accused* ***person pleads "guilty", the plea shall be recorded and he may be convicted*** *thereon.*
> [Emphasis added].

In the instant appeal before us, after entering the plea of guilty to the charge of manslaughter against the appellants, the trial Judge was required by section 282 of the CPA to enter the conviction. That was not done. We agree with the three learned Counsel that failure to enter conviction before proceeding to sentence, is fatal irregularity that invalidates the entire proceedings before the trial High Court.

In light of the foregoing irregularities, the only way open to us is to resort to our power of revision under section 4 (2) of the Appellate Jurisdiction Act, Cap 141. We nullify, quash and set aside the proceedings and decision of the trial High Court in Criminal Sessions Case No. 81 of 2014. We direct a fresh plea should be taken at the High Court by a different trial Judge. It is so ordered.

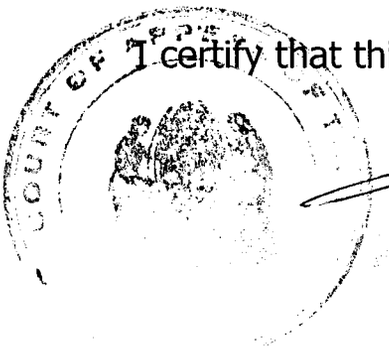
DATED at **MWANZA** this 24th day of May, 2016.

M. S. MBAROUK
JUSTICE OF APPEAL

B. M. LUANDA
JUSTICE OF APPEAL

I.H. JUMA
JUSTICE OF APPEAL

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



J. R. KAHYOZA
REGISTRAR
COURT OF APPEAL