IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

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

CRIMINAL APPEAL NO. 182 OF 2015

MOKIRI MWITA @ GESINE.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Gwae, J.)

Dated the 16th day of March, 2015
in
Criminal Session No. 179 of 2014

JUDGMENT OF THE COURT

24th & 26th May, 2016

MBAROUK, J.A.:

The appellant, Mokiri Mwita @ Gesine, was charged with manslaughter contrary to sections 195 and 198 of the Penal Code. The record of proceedings at the trial court dated 12-3-2015 shows that, when the charge was read over to the appellant, he pleaded guilty by saying "Ni kweli". Thereafter, the trial judge recorded the "Memorandum of Facts" which we

think is wrong as we shall explain later in this judgment. He then proceeded without recording that he has asked the appellant as to whether the facts were true or not. The original record then shows that, the trial judge recorded his findings, but no conviction was entered. After mitigation, the trial judge sentenced the appellant to four (4) years imprisonment. Aggrieved by the sentence, the appellant preferred five grounds of complaint which are as follows:

> *"1. That the Honourable Trial Judge erred to hold, towards sentencing the Appellant, that the Appellant was convicted of manslaughter in the absence of a specific and positive order to that effect;*
>
> *2. That in the alternative to ground 1, the facts read having not disclosed any mental fault against the killer (the Appellant) towards killing Marwa Mage Charwe (the deceased) but having disclosed that the*

Appellant caused death of the deceased accidentally, the Honourable Trial Court erred to convict the Appellant of manslaughter;

3. *That the Honourable Trial Judge erred in fact and law by admitting that the mitigating factors presented by the Appellant disclosed sufficient grounds for a lenient punishment and yet proceeding to sentence the Appellant an old man aged 50 years – to serve a 4 years' imprisonment sentence;*

4. *That the Honourable Trial Court erred to find that the Appellant failed to exercise due diligence when threatening his assailant while no facts leading to that finding was alleged and either proved or admitted.*

5. *That the Honourable Trial Judge erred in fact and law by putting irrelevant considerations of failing to exercise due diligence in the mitigation part of the case towards sentencing the Appellant to serve a 4 years' imprisonment sentence."*

At the hearing, the appellant was represented by two learned advocates namely, Mr. Wilbard Butambala and Mr. Audax Vedasto. Whereas on the other hand, the respondent/Republic was represented by Ms. Bibiana Kileo, learned Senior State Attorney.

In arguing the 1st ground of appeal, Mr. Vedasto submitted that, there is no part on record which made the order of convicting the appellant after he pleaded guilty. He said, the record only shows when sentencing the appellant to four (4) years imprisonment, the trial court found the appellant guilty without convicting him. He then urged us to find that, the irregularity was fatal and it is not curable

because a sentence should have followed after conviction was entered. In support of his contention, he said such an omission is contrary to the requirement stated under section 282 of the Criminal Procedure Act (the CPA). He then prayed for an order of setting aside the sentence and acquit the appellant forthwith.

On her part, the learned Senior State Attorney conceded to the 1st ground of appeal that there was no conviction entered. She said, the omission is contrary to the requirement under the provisions of section 282 of the CPA. Ms. Kileo also pointed out other defects. **Firstly**, she said, the record shows that, after the trial court entered a plea of guilty, the trial judge wrote "Memorandum of Facts" while the practice is to write "Facts". She said, this is because, the "Memorandum of Facts" are written during the stage of Preliminary Hearing (PH) and not when the accused has pleaded guilty to the charge. **Secondly**, she said, the record is silent as to whether the trial judge had asked the appellant after the facts were read to him as to whether they were correct or not. For those

irregularities, the learned Senior State Attorney urged us to invoke section 4(2) of the Appellate Jurisdiction Act, and nullify all the proceedings of the trial court and order the case to be remitted back to the High Court for retrial before another judge.

We on our part, have found it prudent to determine and dispose of this appeal by examining the 1st ground of appeal concerning the pertinent issue of the omission of the trial court not to convict the appellant as directed by the law. It is statutorily required that, after the trial High Court has recorded a plea of guilty of an accused person, the trial judge should convict that accused person to the charge he was arraigned with. Section 282 of the CPA provides as follows:

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

In this case the record clearly shows that, after entering a plea of guilty and the facts read to the appellant, the trial

judge failed to comply with the statutory requirement to convict the appellant.

In addition to that anomaly, we also found as submitted by the learned Senior State Attorney that the trial judge instead of writing "FACTS" he wrote "Memorandum of Facts" which are usually written when conducting a Preliminary Hearing and not after the accused pleads guilty to a charge.

Furthermore, we have also noted just like the learned Senior State Attorney that, the trial judge has failed to ask the appellant as to whether the facts were correct or not after they have been read to him. The erstwhile East African Court of Appeal in the case of **Adan v. R.** [1973] E.A. 443 provided the procedure to be followed after the accused person plead guilty, where it stated as follows:

> *"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 a language which he*

can speak and understand. The magistrate should then explain to the accused person all the essential ingredients of the offence charges. 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 assets 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.)

As shown above, in the instant case the trial judge has failed to ask the appellant as to whether the facts read to him were correct or not, we therefore find the cumulative effect of all the irregularities pointed out herein above invalidates the whole proceedings. In support of our view, see the decisions of this Court in **Nagunwa Peter @ Tyson v. Republic**, Criminal Appeal No. 152 of 2014, **Masolwa Samwel v. Republic**, Criminal Appeal No. 206 of 2014 (both unreported) to name a few.

For the anomalies pointed above, we invoke section 4(2) of the Appellate Jurisdiction Act to nullify, quash and set aside all the proceedings and the sentence imposed on the appellant in Criminal Session No. 179 of 2014. Consequently,

we order the case to be remitted to the High Court for retrial before another Judge. We further order a retrial to be expediated and if thereafter the appellant is convicted, the term he has already served in prison should be taken into consideration. It is so ordered.

DATED at **MWANZA** this 25th 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