

**IN THE COURT OF APPEAL OF TANZANIA
AT BUKOBA**

(CORAM: KILEO, J.A., MJASIRI, J.A. And MMILLA, J.A.)

CRIMINAL APPEAL NO. 312 OF 2015

GROSPERY NTAGALINDA @ KORO APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

**(Appeal from the conviction and Judgment of the High Court
of Tanzania at Bukoba)**

(Matogolo, J.)

**Dated the 26th day of June, 2015
in
Criminal Session No. 85 of 2008
.....**

RULING OF THE COURT

15th & 22nd February, 2016

MMILLA, J.A.:

The appellant, Crospery Ntagalinda @ Koro was charged with murder contrary to section 196 of the Penal Code Cap. 16 of the Revised Edition, 2002, it having been alleged that he murdered George Ngimbwa. He was tried by the High Court at Bukoba, convicted and sentenced to suffer death by hanging. He was aggrieved with the judgment of the trial High Court, hence the present appeal to this Court.

Before us the appellant, who was also present in Court was represented by two advocates; Mr. Mathias Rweyemamu, learned advocate who had private instructions from the appellant and Mr. Aaron Kabunga, learned advocate who was appointed by the Court. On the other hand, Mr. Hashim Ngole, learned Principal State Attorney represented the respondent Republic.

Three sets of memoranda of appeal were filed in this regard. The first set was filed on 16.12.2015 by Mr. Rweyemamu, the second was filed on 27.1.2016 by the appellant himself, and the third set is a supplementary memorandum of appeal filed on 15.2.2016.

At the commencement of hearing, Mr. Kabunga rose and requested to begin with the grounds contained in the supplementary memorandum of appeal which had two grounds as follows:-

1. That, the trial judge of the High Court erred in law in convicting the appellant in unfair trial which violated the mandatory provisions of section 293 (2) of the Criminal Procedure Act Cap. 20 of the Revised Edition, 2002 (the CPA).

2. That the court erred in law to convict the appellant in the unprocedure (sic) trial which violated the provisions of section 192 (3) of the CPA

Since these grounds were points of law which, if allowed could lead to finality of the appeal, it was proposed and the Court agreed that the Court allowed both parties to address it on these points first and retire to make a decision before we could proceed, if need there be, with the rest of the grounds of appeal. This is the essence of the instant decision.

In his submission in respect of the first ground, Mr. Kabunga maintained that there was unfair trial for non-compliance with section 293 (2) of the CPA because the appellant was not informed of his rights obtaining under that section. He was emphatic that the section is coached in mandatory terms, therefore that the trial court had no option but to comply with the demands of that provision. He said, looking at pages 95 and 96 of the Court Record, it is certain that there was no compliance, and that in their submission the appellant was seriously prejudiced. Relying on the cases of **Maria Paskali v. Republic**, Criminal Appeal No. 18 of 2006, CAT and **Melkizedeki Mkuta v. Republic**, Criminal Appeal No. 17 of

2006, CAT (both unreported), Mr. Kabunga urged the Court to allow the appeal and release the appellant from prison.

The appellant's advocates complaint in the second ground is against non-compliance with section 192 (3) of the CPA. Mr. Kabunga submitted in this regard too that the section is couched in mandatory terms such that it required total compliance nothing less. It requires that after preliminary hearing has been conducted, the matters agreed upon must be read over to the accused. He contended that looking at page 5 of the Court Record, it is beyond certain that the trial High Court did not read the said memorandum of undisputed facts before the same was signed. Mr. Kabunga submitted that this again was fatal because it made the entire proceedings unfair and irregular. Mr. Kabunga conceded however, that the omission did not prejudice the appellant.

On his part Mr. Ngole too tackled first the ground in relation to non-compliance of section 293 (2) of the CPA. He submitted that the trial High Court judge complied with that provision in view of what appears at page 96 of the Court Record. At that page, he submitted, immediately after the ruling that found the appellant to have a case to answer his advocate was recorded to have responded in clear terms which reflected that they were

addressed in terms of section 293 (2) of the CPA. He stressed that the advocate's reply could not have been accidental that he said those words. Of course, he admitted that the trial court did not specifically indicate in the record that it complied with that section. He submitted that the case of **Melkizedeki Mkuta v. Republic** (supra) was distinguishable because in that case the advocate had not said anything bearing on the appellant's right under section 293 (2) of the CPA. On the other hand the case of **Maria Paskali v. Republic** (supra) is distinguishable because no sufficient facts were given to assist one to know what led to that conclusion.

At any rate, Mr. Ngole submitted, the appellant in the present case was not prejudiced because he knew how to defend himself in that he elected to give sworn defence, and also called witnesses. Similarly the appellant said he was going to have one exhibit and they tendered it in court. He relied on the case of **Nyeura Patrick v. Republic**, Criminal Appeal No. 73 of 2013, CAT (unreported).

Avoiding to put all the eggs in one basket, Mr. Ngole submitted in the alternative that if it may be found that the trial judge did not comply with the demands of section 293 (2) of the CPA, then the Court should follow

the stand taken in the cases relied upon by his learned friend Mr. Kabunga by nullifying that part which is within non-compliance. Otherwise, he pressed the Court to dismiss this ground.

As regards non –compliance with section 192 (3) of the CPA, Mr. Ngole admitted non-compliance but was quick to add that the omission did not occasion injustice to the appellant. He relied on the case of **Bahati Robert v, Republic**, Criminal Appeal No.146 of 2013, CAT (unreported). He urged the Court to dismiss this ground too.

In a brief rejoinder, Mr. Kabunga emphasized that the trial judge had duty to address the appellant the rights obtaining under section 293 (2) of the CPA. He also contended that the case of **Nyeura Patrick v. Republic** (supra) cited by Mr. Ngole is distinguishable because in that case the trial judge had cited section 231 of the CPA which is applicable to subordinate court, and that section is identical to section 293 (2) of the CPA. He submitted therefore that the case is distinguishable from the instant case. He reiterated his prayer for the first ground to be allowed.

We have carefully gone through the pages we have been referred to in the Court Record, so also the rival submissions of counsel for the parties.

We are grateful to them all for their powerful submissions. Like they did, we will begin with the ground touching on trial court's compliance or otherwise with section 293 (2) of the CPA. That section provides that:-

*"(2) When the evidence of the witnesses for the prosecution has been concluded and the statement, if any, of the accused person before the committing court has been given in evidence, the court, if it considers that there is evidence that the accused person committed the offence or any other offence of which, under the provisions of section 300 to 309 he is liable to be convicted, **shall inform the accused person of his right—***

(a) to give evidence on his own behalf; and

(b) to call witnesses in his defence,

and shall then ask the accused person or his advocate if it is intended to exercise any of those rights and record the answer; and thereafter the court shall call on the accused person to enter on his defence save where he does not wish to exercise either of those rights."

[Emphasis provided].

It is incontrovertible that the requirement to inform the accused his or her rights under section 293 (2) of the CPA is mandatory, meaning that it must be performed as instructed. As is clear from that section, most important was to inform the appellant that he could give evidence on his own behalf and call witnesses in his defence.

In the present case, the learned trial court judge did not specifically indicate in the record that he had complied with the requirement of section 293 (2) of the CPA. However, immediately after that ruling was pronounced, Mr. Lameck Erasto, the then appellant's advocate was recorded to have said that:-

"My Lord we intend to bring three witnesses the first witness is the accused himself. Second is Rozeta Crosperry and the third is Dr. Robert Kalumuna. We will also have one exhibit, the report on post mortem examination prepared by Dr. Kalumuna. The accused will give evidence after being sworn. I pray for brief adjournment in order to communicate with my client. That is all."

It is obvious from the above that though the trial court did not specifically record his address to the appellant of the rights under the said

section, the appellant exercised those rights in full as if they were explained to him.

In our present case Mr. Kabunga relied on the case of **Melkizedeki Mkuta v. Republic** (supra) and **Maria Paskali v. Republic** (supra) as afore said in which the Court commonly held that omission to explain the appellants rights under section 293 (2) of the CPA was a fundamental irregularity that resulted into unfair trial.

In the circumstances of the present case, we agree with Mr. Ngole that those cases are distinguishable from the instant one for different reasons. As submitted by Mr. Ngole, unlike in our present case where the appellant was informed of and exercised the rights under the section under consideration, in **Melkizedeki Mkuta v. Republic**, the conclusion was arrived at after agreeing with the submission by the appellant's advocate that the appellant's rights under section 293 (2) of the CPA **were completely ignored**. It is on that basis that the Court held that the omission was fatal, resulting into unfair trial. It nullified the proceeding which followed the close of the prosecution case.

As regards the case of **Maria Paskali**, we once again agree with Mr. Ngole that the situation in that case cannot be compared to our instant one because no facts were provided which influenced the Court into reaching the conclusion that the omission was fatal and resulted into unfair trial. The Court merely said that the appellant was not accorded the rights spelt out under section 293 (2) of the CPA without more. As such, that case too is distinguishable to the present one.

As we have already stated, the appellant's advocate in the present case carried the day when he mitigated the trial court's mistake of non – compliance with section 293 (2) of the CPA when he addressed the Court on how the appellant was going to make his defence, thus suppressing injustice which could have resulted. The Full Bench of this Court had the occasion of dealing with a situation like this in the case of **Bahati Makeja v. Republic**, Criminal Appeal No. 118 of 2006, CAT (unreported) when it stated at page 7 that:-

"It is our decided opinion that where an accused person is represented by an advocate then if a judge overlooks to address him/her in accordance with s. 293 of the CPA the paramount factor is whether or not injustice has been occasioned."

*In the current matter there was no injustice occasioned in any way at all. **It is palpably clear to us that the learned Judge must have addressed the accused person in terms of s. 293 of the CPA and that is why the learned advocate stood up and said that the accused person is going to defend himself on oath.** But even if the learned judge had omitted to do so, the accused person had an advocate who is presumed to know the rights of an accused person and that he advised the accused person accordingly and hence his reply.”*[Emphasis provided].

In that case, the Full Bench directed the appeal to go back to a Full Court to be heard and determined on merits.

For these reasons, we find and hold that the non – recording, by the trial judge of his address to the appellant in terms of section 293 (2) of the CPA did not occasion injustice as complained of in the first ground in the supplementary grounds of appeal.

We now come to the second ground which allege that the trial court violated the provisions of section 192 (3) of the CPA. The complained of section provides that:-

"(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."

The learned counsel of both sides share the view that actually, that provision was not complied with in so far as the record shows quite clearly that the memorandum of agreed matters was not read over as contemplated by that section. Fortunately however, the learned counsel for the parties agree as well that the omission did not prejudice the appellant.

On our part, we agree with them in full; firstly that the memorandum of agreed matters was not read over to the appellant as stipulated under section 192 (3) of the CPA; and secondly that because the proceedings were merely preparatory proceedings, it could not be said he was in any way possible prejudiced. In end, this ground too lacks merit.

Before we conclude, we think that it is important to remind judges and magistrates that whenever a particular section may have imposed

functions to be discharged by the court, the judges and magistrates have a duty to comply with the demands of the law for proper administration of justice. That way, the courts will enhance public confidence to their credit.

In conclusion, we direct the appeal to proceed with hearing in the next session of the Court on the rest of the grounds raised.

Oder accordingly.

Dated at Bukoba this 18th Day of February, 2016.

E. A. KILEO
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

B. M. MMILLA
JUSTICE OF APPEAL

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


E.F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL