IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

(CORAM: LUANDA, J.A, MMILLA, J.A And MKUYE, J.A.)

CRIMINAL APPEAL NO. 113 OF 2016

THE DIRECTOR OF PUBLIC PROSECUTIONS..... APPELLANT

VERSUS

ABDALLAH SAUZI .....1ST RESPONDENT
ESSAU ABDALLAH @ SAID .....2ND RESPONDENT
MUSSA ABDALLAH @ KABIKA.....3RD RESPONDENT
FRANK MICHAEL .....4TH RESPONDENT

(Appeal from the decision of the High Court of Tanzania

at Tabora)

(Mrango, J.)

dated on 15th day of February, 2016

in

Criminal Session No. 92 of 2014

JUDGMENT OF THE COURT

15th August & 19th September, 2017

MKUYE, J.A:.

In the High Court of Tanzania at Tabora the respondents Abdallah Sauzi, Essau Abdallah @ Said, Mussa Abdallah @ Kabika and Frank Michael were jointly charged with the offence of murder contrary to section 196 of the Penal Code, Cap. 16, R.E. 2002 vide Criminal Sessions Case No. 92 of 2014. It was alleged that on the 26th

day of May 2013 during night hours at Itabundala village within Urambo District in Tabora Region they murdered one Jackson Kagoma.

When the information of murder was read over and explained to them on 29/9/2015, they each entered a plea of not guilty. Thereafter, preliminary hearing was conducted by virtue of section 192 of the Criminal Procedure Act, Cap 20, RE 2002 (the CPA) whereby a memorandum of agreed facts and lists of witnesses and exhibits to be relied upon were prepared.

The trial commenced before Hon. Mrango J. on 12/02/2016 and three witnesses testified. In the course of testifying in court, PW3 F. 9073 Rahim Maarufu prayed to tender as an exhibit, a *"panga"*, which he alleged to have collected from the scene of crime. The Court asked the defence counsel, one Mr. Yusuf Mwangazambili, as to whether he objected or otherwise for the same to be tendered but he did not object. Thereafter, the trial court ruled as hereunder:

> *"Despite the fact that Mr. Yusufu Mwangazambili has no objection with the tendering of the said*

exhibit (panga) the Court cannot admit the ***said 'panga' as it is not listed in the list of the exhibits during the preliminary hearing.***

It is so ordered".

[Emphasis is ours].

The Director of Public Prosecutions (the DPP) is aggrieved with the said order, hence, this appeal and raised the following grounds:

1) *The Honorauble trial judge erred in law and in fact to reject the exhibit intended to be tendered in court without affording opportunity to defend (right to be heard).*
2) *The trial judge erred in law and in fact to rule out that the exhibit was not in preliminary hearing listed while in fact the same is in summary of facts narrated before the court on 29/09/2015.*

On the other hand, each respondent filed a notice of cross appeal in which they raised identical grounds to the effect that, **one,** they were not supplied with PI record; **two**, the rejection of the exhibit by the trial judge was proper; and **three,** they have stayed in remand prison for four years.

At the hearing of the appeal Mr. Juma Masanja learned Senior State Attorney represented the appellant Republic, while the 2nd, 3rd and 4th respondents enjoyed the services of Mr. Mwangazambili learned counsel. As to the 1st respondent, Mr. Masanja informed the Court that he passed away on 3/8/2017. Upon satisfying ourselves through a certified copy of burial permit dated 3/8/2017, we marked the appeal against the 1st respondent to have abated under Rule 78 (1) of the Tanzania Court of Appeal Rules, 2009 (the Rules).

In arguing the appeal, Mr. Masanja submitted in respect of the first ground that the trial judge was wrong to reject the exhibit "panga" for the reason that it was not in the list of exhibits extracted during preliminary hearing without affording the appellant a chance to submit on it. In that case he was of the view that the principles of natural justice were violated as they were condemned unheard. He referred to us the case of **DPP vs. Sabinis Inyasi Tesha & Another** (1993) TLR 237.

The learned Senior State Attorney went on to submit that though the trial judge rejected the "panga", it was mentioned in the

summary of facts. He referred us the case of **Jackson Daudi vs. R.,** Criminal Appeal No. 11 of 2002 page 8. The learned Senior State Attorney added that the said "panga" was also listed during the committal proceedings.

When asked to comment on the Notices of Cross appeal lodged by the respondents, Mr. Masanja submitted that unlike the DPP who is allowed to appeal against interlocutory orders under section 6 (2) of the Appellate Jurisdiction Act, Cap. 141, R.E 2002, (the AJA), the respondents are not allowed to do so under section 5 (2) (d) of the same Act. He cited the case of **DPP vs. Farid Hadi Ahmed & 9 Others,** Criminal Appeal No. 96 of 2013 page 16 in support of this proposition. He, therefore, urged the Court to strike out the respondents' notices of cross appeal.

On his part, Mr. Mwangazambili in a short and focused submission conceded to both grounds raised by the appellant. He based his argument on the reason that the trial judge did not give an opportunity to the appellant to argue his case. Moreover, he contended that the exhibit "panga" which was rejected by the trial

judge was listed during the committal proceedings and mentioned in the summary of facts read over to the respondents during preliminary hearing.

With regard to the notices of cross appeal lodged by the respondents, he was categorical that section 5 (2) (d) of the AJA did not allow any appeal, revision or review against any interlocutory order unless it had the effect of determining the criminal charge or suit. He thus prayed to the Court to strike them out.

The issue to be resolved by this Court is whether the trial court did reject the exhibit sought to be tendered without affording the appellant the opportunity to defend her case.

We wish to take off by stating that in our Land, equality before the law and the right to a fair trial or hearing (principles of natural justice) are fundamental constitutional rights. They are enshrined under Article 13 (1) and 6 (a) of the Constitution of the United Republic of Tanzania, Cap 2, R.E. 2002 (the Constitution) which state as follows:

"13 (1) All persons are equal before the law and are entitled, without any discrimination, to protection and equality before the law.

(2) .....

(3).....

(4).....

(5).....

(6) To ensure equality before the law, the state shall make procedures which are appropriate or which take into account the following principles, namely:

(a) when the rights and duties of any person are being determined by the Court or any agency, that person shall be entitled ***to a fair hearing*** *and to the right of appeal or other legal remedy against the decision of the Court or the other agency concerned"*

[Emphasis supplied]

The spirit of the above cited provision is for the party whose rights are to be determined to be heard fully. Incidentally, this Court

has through various decisions settled down the law that denial of a fair hearing or trial is a fundamental irregularity which infringe the interest of justice or rather affect the people's right of fair trial.

In the case of **DPP vs. Tesha** (supra) the issue of the adherence to principles of natural justice was emphasized and the Court stated as follows:

> *"It is a cardinal principle of natural justice that a party should not be condemned unheard; the appellant was not given an opportunity to respond to the allegation that the cautioned statement made by one of the respondents was illegally obtained."*

Yet in another case of **Ngassa Kapuli @ Sengerema vs. Republic** Criminal Appeal No. 160 "B" of 2014 (unreported) this Court held that:

> *"So the rule requiring a fair hearing is broad enough to include the rule against bias. It is fundamental to fair procedure that both sides should be heard. The right to a fair hearing requires that* ***individuals are not penalized by decisions affecting their rights*** *or legitimate expectations unless they have*

been given a ***fair opportunity to answer cases against them and present their own cases".***

[Emphasis supplied].

In the instant case, it is not in dispute that the trial judge rejected the "panga" which PW3 had sought to tender as exhibit. The Court record shows at page 21 that after the defence counsel had not objected for its being tendered, the trial judge proceeded to reject it for the reason that the said "panga" was not listed during the preliminary hearing. As it were, he made that decision without first giving the parties an opportunity to submit for or against the tendering of an exhibit which is not listed during the preliminary hearing. We think that if the trial judge thought it to be a reason for rejecting the panga as an exhibit, he should have called upon the parties to submit on it before rejecting it on that basis. Failure to afford the appellant an opportunity to be heard amounted the violation of one of the cardinal principles of natural justice of hearing the party *(audi alteram partem*).

At any rate, the law governing preliminary hearing is section 192 of the Criminal Procedure Act, Cap. 20, R.E. 2002. For reasons to be

shown shortly we find it necessary to reproduce it. The said provision states as hereunder:

> *"192 (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 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 expeditions trial.*
>
> *(2) In ascertaining such matters that are not in dispute the court shall explain to an accused who is not represented by an advocate about the nature and purpose of the preliminary hearing and may put questions to the parties as he thinks fit; and the answers to the questions may be given without oath or affirmation.*
>
> *(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 this 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 interest of justice so demand, the court may direct that any fact or document admitted or agreed in a memorandum filed under this section be formally proved.

(5) .....

(6) ....."

Also the provisions of Rules 4 and 6 of the Accelerated Trial and Disposal of Cases Rules, 1988, GN No. 192 of 1988 expound the manner in which preliminary hearing is be conducted. The said Rules provide as follows:

"4. The person prosecuting shall in every trial under those rules, prepare, the facts of the case which

shall be read to the accused and explained in a language he can understand.

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."

The purpose of the enactment of the above provisions in 1988 and 1992 is not far-fetched. History tells that they were enacted in order to accelerate trials and thereby reduce the time and expenses of criminal trials. It was intended to put in place a system of ascertaining at the earliest stage in the proceedings the matters which are not in dispute and enable the evidence to be brought on disputed matters which are to be proved by only few witnesses who would be summoned at the trial.

In the case at hand, the summary of facts was prepared and read over to the accused persons (respondents) as shown at pages 3 – 4 of the Court record. Thereafter, the memorandum of agreed facts was prepared and was signed by all the respondents, the defence counsel, two state attorneys for the Republic and the trial judge. This

was followed by the lists of prosecutions' witnesses and exhibits respectively (See pages 7-8). In the list of exhibits prepared during preliminary hearing only the deceased's postmortem report and the sketch map of the crime scene were mentioned. The "panga" was not included.

Both counsel are of the view that it was improper to reject it (the panga) as long as it was mentioned in the summary of facts read over to the accused persons. The relevant part of the summary of facts reads:

> *"...When they finished the said meeting they went outside where all four accused persons together with their relative by the name of HARUNA ABDALLAH who is yet to be arrested followed JOHNSON KAGOMA and started attacking him by big sticks, hoe handles* ***cutting him using machetes on different parts of his body..."***

But again, in the last paragraph of the summary of facts, Mr. Mlekano Senior State Attorney stated that:

"Your honuor .... All exhibits will be tendered during the trial ..."

Indeed, the "panga" featured in the committal proceedings of the District Court. From the above extracts there is no doubt that the machete was mentioned in the summary of facts and that the learned State Attorney did indicate that all the exhibits (the "panga" inclusive) would be tendered during trial. In our view, the fact that, machete and its the usage was explained in the summary of facts, it sufficiently notified the court and the respondents of its existence. And since it was not among the fact which was agreed by the accused persons, then it was proper for the witness who retrieved it to produce it in Court when he was testifying.

Be it as it may, when faced with similar situation in the case of **Jackson Daudi** (supra) this Court observed as hereunder:

"We observe that neither section 192 of the Criminal Procedure Act, 1985 nor Rule 4 and 6 of GN No. 192 of 1988 or observation of this Court in the case ***of Bahati Masebu*** *(supra) require that documents containing evidence which is*

> *disputed by an accused person during a preliminary hearing has to be produced at the preliminary hearing and listed as an exhibit to be tendered at the trial. What this Court said in* ***Bahati Masebu*** *was that "materials* ***contained*** *in documents" (our underscoring), not necessarily the documents themselves, are also to be* ***"explained"*** *to the accused (our underscoring again). It is the non-compliance with such requirements that this Court said "may result into quashing of the convictions or appeals."*

In this case, though the trial judge rejected the production of a "panga" for reason that it was not listed during the preliminary hearing, we have failed to glean where such requirement is so provided under section 192 of the CPA or Rules 4 and 6 of GN No 192 of 1988. On the basis of the above cited authority we find that the trial judge's denial to admit the "panga" which was sought to be tendered was not proper. Had he invited the parties to address him on the aspect, we think he would not have come to the conclusion he made. We, therefore, agree with the appellant that the denial of the right to

be heard prejudiced the appellant. As such we find the two grounds of appeal to have merit and uphold them.

There is an issue of the notices of cross appeal which were lodged by the respondents. Their complaints which are identical are that they were not supplied with the PI record; that the rejection of the exhibit by the trial judge was proper; and that they have stayed in remand prison for four years. As it can be observed it is not clear as to where their notices emanated from and more so when taking into account that the trial court did not make determination on the issues raised by them. In fact the matter had not been decided conclusively as such they have no right to appeal. The DPP appealed against an interlocutory order of the trial court following its denial to receive the "panga" as an exhibit and, rightly so in our considered view, because he is under section 6 (2) of the AJA given a right to appeal against any acquittal, sentence or order made or passed by the High Court or by a subordinate court exercising extended jurisdiction. The said provision provides as hereunder:

"Where the Director of Public Prosecutions is dissatisfied with any acquittal, sentence or order made or passed by the High Court or by a subordinate court exercising extended powers he may appeal to the Court of Appeal against the acquittal, sentence or order as the case may be, on any ground of appeal."

On the other hand, section 5 (2) (d) of the AJA sets out different conditions to parties other than the DPP. It provides as follows:

"Notwithstanding the provisions of subsection (1) – (d) No appeal or application for revision shall lie against or be made in respect of any preliminary or interlocutory decision or order of the High Court unless such decision or order has the effect of finally determining the criminal charge or suit."

As was alluded by both counsel the above cited provision in no uncertain terms prohibits any appeal or revision against interlocutory orders of the High Court to this Court. It allows only those which lead

to the final conclusion of the matter. Thus, in the case of **DPP vs Farid Hadi Ahmed** (Supra) the Court stated as follows:

> *"It must be obvious to all now that in the entire section 6 which clothes this Court with jurisdiction to hear and determine criminal appeals from the High Court and subordinate courts with extended powers, there is no provision similar to, leave alone one identical with s.5 (2) (d) reproduced above. For this very obvious reason, we have found ourselves constrained to accept without any demur, Ms Fatuma's irresistible contention that the right of the DPP to appeal against "any acquittal, sentence or order made or passed by the High Court or by subordinate court exercising extended powers", was left unfettered by total prohibition against appeals or revision applications to this Court in relation to preliminary or interlocutory decision or order."*

Even in this case, in view of the afore-going and by virtue of the provisions of section 5 (2) (d) of the AJA, we find that the respondents' notices of cross appeal are misconceived simply because

the law prohibits any appeal or application for revision against interlocutory orders unless they have the effect of concluding the matter. As such we strike them out the Court's Registry.

For the a foregoing reasons, we allow the appeal and quash the order of the High Court. Since the defence had no objection, we direct that the said "panga" be admitted as an exhibit and the matter proceed from where it ended.

It is so ordered.

DATED at **TABORA** this 31st day of August, 2017.

B. M. LUANDA
JUSTICE OF APPEAL

B. M. MMILLA
JUSTICE OF APPEAL

R. K. MKUYE
JUSITCE OF APPEAL

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

A. H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL