IN THE COURT OF APPEAL OF TANZANIA

AT BUKOBA

(CORAM: MBAROUK, J.A., MKUYE, J.A. And WAMBALI, J.A.)

CRIMINAL APPEAL NO. 568 OF 2017

1. BAHATI BUKOMBE
2. JOVINARY KAHIGI@ PROTUS .....APPELLANTS
3. PROTACE PAUL @ BALILEMWA

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Bongole, J.)

dated the 17th day of November, 2017

in

Criminal Session Case No. 41 of 2015

RULING OF THE COURT

29th August & 5th September, 2018

MKUYE J.A.:

The High Court of Tanzania at Karagwe (Bongole, J.) convicted the appellants with the offence of murder contrary to section 196 of the Penal Code, Cap. 16, R.E. 2002 (the Penal Code) vide Criminal Session Case No. 41 of 2015 and sentenced them to the usual punishment for the offence of murder which is death by hanging. Aggrieved, they have each lodged in

Court a separate memorandum of appeal although they lodged a joint notice of appeal. On 21-8-2018, a supplementary memorandum of appeal in respect of all appellants was filed by Ms. Mrema, learned advocate. However, for reason to be obvious shortly we do not intent to reproduce them.

When the appeal was called on for hearing the appellants were represented by Ms. Jaqueline Evaristus Mrema learned counsel; whereas the respondent Republic was represented by Mr. Nestory Paschal Nchiman, learned State Attorney.

Before proceeding with the hearing of the appeal on its merit, we wished to satisfy ourselves as to whether there was a proper information against the appellants in view of the fact that initially, there were two separate information; one in relation to the 1st and 2nd accused (1st and 2nd appellants) and another one relating to 3rd accused (3rd appellant) alone, which were at one stage consolidated into one.

Our great interest was to know as to which information was read over to the appellants after the two cases, Criminal Session Cases Nos. 41 of 2015 and 46 of 2016 were consolidated into one on 1/9/2016. Our

quest was to which information all the accused persons entered plea of not guilty.

Our anxiety became more apparent when we observed that on 3/11/2017 the State Attorney for the Republic who appeared before the trial began, sought to amend the charge so that where it reads "2015" should read "2014". It would appear the amendment was intended to amend the year which was appearing on the information sought to be amended, which unfortunately, do not feature in the record of appeal.

Ms. Mrema readily conceded to the concern raised by the Court. She contended that the information sheet at page 1 of the record of appeal related to the 1st and 2nd appellants to which they entered a plea. At page 5 of the record it shows that Criminal Sessions cases No. 41 of 2015 and Criminal Session Case No.46 of 2016 were consolidated into one and remained with Criminal Sessions Case No. 41 of 2015. She pointed out further that at page 14 of the record, the State Attorney prayed, which prayer was granted to amend the charge where it reads "2015" to read "2014". She was of the view that, as the prayer was made under section 276(2) of the Criminal Procedure Act, Cap. 20 R.E. 2002 (the CPA), the

State Attorney ought to amend the information as per subsection (3) of the said section, though, we think, it was the duty of the Court to endorse such amendment as we shall demonstrate later on.

Ms. Mrema contended further that, going by the record it is not known as to which information was amended, which means, it can be implied that the 3rd appellant was not charged and his case was never heard, as he did not know the charge laid against him. As to the fate of the 1st and 2nd appellants she said, they might have been prejudiced for being joined in the case with a stranger. For those reasons she said that, since the appellants were tried on uncertain information, it vitiated the whole proceedings and judgment with the effect of rendering it a nullity. She implored the Court to invoke its revisional powers under section 4(2) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2002 (the AJA) and nullify both the proceedings and judgment, quash the conviction, set aside the sentence and order for a retrial before a different judge and a different set of assessors.

On his part, Mr. Nchiman joined hands to what was submitted by Ms. Mrema. He, however, added that, though the Criminal Sessions case No.

41 of 2015 and Criminal Sessions Case No. 46 of 2016 were consolidated, it is not known as to which information the appellants entered plea in view of the fact that, there is only one information found at page 1 of the record of appeal and the information against the 3rd appellant is not in the record. He submitted further that, as on 10-5-2016 only 1st and 2nd appellants entered plea and the facts read over were in respect of the two appellants, the 3rd appellant did not know his charge and, hence, the proceedings were vitiated from the beginning up to the point of judgment and conviction.

As to the way forward, he, like Ms. Mrema, prayed to the Court to invoke section 4(2) of the AJA and nullify the proceedings and judgment, quash the conviction, set aside the sentence thereof and order a retrial.

On our part, after having examined the court record and the submissions of both counsel, we are satisfied that there was a glaring shortcoming on the issue of the charge sheet or information.

The record, at page 1 shows that an information for murder against Bahati s/o Bukombe and Jovinary s/o Kahigi @ Protus (the 1st and 2nd appellant) was filed in court on 18-8-2015. The said information was registered as Criminal Sessions Case No. 41 of 2015.

On 10-5-2016 as well as on 1-9-2016, the 1st and 2nd appellants entered plea in Criminal Sessions Case No. 41 of 2015 which was purportedly retained. On the same 1-9-2016 Mr. Njoka learned State Attorney for the Republic, intimated the trial court of the existence of another case that is Criminal Sessions Case No. 46 of 2016 involving one accused one Protus Paul@ Balilemwa alone which, emanated from the same transaction as in Criminal Sessions No. 41 of 2015. He prayed for consolidation. Upon having no objection from Ms. Mrema who advocated for the appellants, the trial court granted the prayer and the two cases were consolidated into one and thus Criminal Sessions Case No. 41 of 2015 was retained.

It would appear that, that is where the problem started as the record shows that on that date **a charge or rather an information for murder contrary to section 196 of Penal Code was read over to all the appellants and they each pleaded not guilty to the charge.**[Emphasis is ours]. Though the record shows the information to have been read over to all appellants, it is not known as to which information between the one filed on 18/8/2015 against the 1st and 2nd appellant which is currently the only one available in the record of appeal

and the one which related to the 3rd appellant in Criminal Sessions Case No. 46 of 2016 was read over. We say so because, the said information which was allegedly read over is not included in the court record. Even if we assume that the information read was the one in Criminal Sessions Case No. 41 of 2015, then the 3rd appellant must have been a stranger for the said charge did not involve him in anyway. Even assuming that the one read was that one in Criminal Sessions No. 46 of 2016, then the 1st and 2nd appellants were equally strangers in an information which involved the 3rd appellant alone. Whatever the case, the question that is still nagging is on which information all appellants entered their pleas.

It would appear the matter did not end there as on the same date (1-9-2016) the State Attorney sought to adopt and read the facts of the case he had filed earlier on. Our quick glance on the facts found at page 7-8 of the record do not reveal as to who were the accused persons due to a "settled" practice used by prosecutors in referring the accused persons in the facts of the case. This is depicted in the opening words of facts of the case at page 7 of the record that, *"The names of the accused persons are as they appear on the information filed in court".*

We think, this is a practice which should be condoned since, for a person who was not in court on that date cannot be certain as to who amongst the accused referred to was in court. This also complicates the matter for not disclosing as to which information is referred to in the facts of the case. Still it is not certain as to whether the information referred to was the one in Criminal Sessions No. 41 of 2015 which involves the two appellants or the one in Criminal Sessions Case No. 46 of 2016 which is not in the record.

Be it as it may, on 3/11/2017 in a manner which seems that the issue of the charge sheet had not yet cleared the dust, Mr. Kahigi, learned State Attorney yet prayed to make an amendment on the charge sheet and the prayer was granted. We leave the prayer to speak for itself:-

> *"My Lord, I pray to make and (sic) amendment on the charge sheets under section 276(2) that where* ***it is written 2015 in the charge sheet may read 2014".***
>
> [Emphasis added].

In our view, we think, that the prayer complicates the matter even more. We say so because, assuming the information in question is the one filed on 18-8-2015 shown at page 1, the figure "2015" appears thrice. It appears in the number of case, particulars of the offence and at the bottom showing the date of presentation of the said charge sheet. If the said figure is substituted by the figure "2014" then it means the case number would be Criminal Sessions Case No. 41 of 2014. The date of commission of offence would be 28/5/2014 and the date of presenting the charge sheet will be 18/8/2014.

We may also wish to observe that Mr Kahigi's prayer complicated the matter from another perspective. His prayer to amend the "charge sheets" meant that there was still more than one charge although they had been consolidated. But the trial Judge ordered that **"A prayer to amend the charge sheet...(which means only one) is hereby granted as prayed** (See page 14 of the record). Of course, that might be not very important but the crucial issue is which charge was amended; and whether or not the amendment in the charge covered all the three appellants.

At this juncture, we wish to look at section 276(2) of the CPA which was invoked by the learned State Attorney in his prayer to amend the information. It reads as follows:

> *"276(2) Where before a trial upon information or at any stage of the trial it appears to the court that the information is defective, the court shall* ***make an order for the amendment of the information*** *as it thinks necessary to meet the circumstances of the case unless, having regard to the merits of the case, the required amendment cannot be made without injustice; and all such* ***amendments shall be made upon such terms as to the court shall seem just.***

However, subsection (3) of section 276 provides:

> *(3) Where an* ***information is amended, a note of the order for amendment shall be endorsed on the information and the information shall be treated for the purposes of all proceedings***

in connection therewith *as having being filed in the amendment form."*

[Emphasis added]

According to the above provisions of the law, the court can order for an amendment of the information if necessary on the terms which it deems just. If the court makes such an order, it is required under subsection (3) to **endorse** on the information, to enable such information to be treated for purpose of all proceedings in connection therewith as having been filed in the amended form. The provision as it is does not require the state attorney to amend the charge sheet as Ms. Mrema tried to suggest.

In this case, though the trial judge granted the prayer to amend the information which institutes the complaint, we have failed to glean the amended information endorsed by the court to enable it to be taken as such for purposes of all the proceedings. We think, these shortfalls have culminated to the dilemma we are facing as to which information was used to try all the appellants. And, if the issue of the information which institute the complaint is uncertain, can it be said that the appellants received a fair trial. In our view, no. We say so because, under those circumstances the

3rd appellant whose information does not feature anywhere in the record must have been a stranger to the case the 1st and 2nd appellants were facing. He might not have known the nature of the offence he was facing or even be in a position to prepare his defence. As to the 1st and 2nd appellants, even if the information read over was the one filed on 18-8-2015 against them, we think, they might have been also prejudiced for being joined by a stranger to the case they were facing and more so, when taking into account that they were tried together from the beginning of the trial until at the end of the trial whereby all the three appellants were convicted. These are reasons why we said that there was a glaring shortcoming on the information.

The most unfortunate part is that even the judgment at page 105 of the record shows that the same is in respect of Criminal Sessions Case No. 41 of 2015, which had earlier been amended to be Criminal Sessions Case No. 41 of 2014. This anomaly is also vividly reflected in the notice of appeal lodged by the appellants, the memorandum of appeal lodged by the counsel for the appellants and other documents lodged in Court, to be specific the list of authorities.

To cull it up, we think, with all the uncertainties as to which information the appellants stood charged with, it was a fatal irregularity with an effect of rendering the entire proceedings a nullity.

Given the circumstances, we invoke our revisional powers vested on us under section 4(2) of the AJA and nullify the proceedings and the judgment of the trial court, quash the conviction and set aside the sentence thereof. We further order for an expeditious retrial before a different judge and a new set of assessors.

It is so ordered.

DATED at **BUKOBA** this 5th day of September, 2018.

M. S. MBAROUK
JUSTICE OF APPEAL

R. K. MKUYE
JUSTICE OF APPEAL

F. L. K. WAMBALI
JUSTICE OF APPEAL

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

E. Y. MKWIZU
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL