

IN THE COURT OF APPEAL OF TANZANIA

AT BUKOBA

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

CRIMINAL APPEAL NO. 179 OF 2017

- 1. DASTAN MAKWAYA**
- 2. JOVITH @ MTAGAYWA JOVINAPPELLANTS**

VERSUS

THE REPUBLIC..... RESPONDENT

**(Appeal from the decision of the High Court of Tanzania at
Karagwe)**

(Bongole, J.)

dated the 26th day of May, 2017

in

Criminal Session No. 12 of 2015

RULING OF THE COURT

21st & 24th August, 2018

MBAROUK, J.A.:

In the High Court of Tanzania at Karagwe, the appellants, Dastan s/o Makwaya and Jovith @ Mtagaywa Jovin were arraigned for murder contrary to section 196 of the Penal Code [Cap. 16 R.E. 2002]. The prosecution alleged

that on 17th June, 2013 at Kagenyi village within Kejerwa District in Kagera Region, the appellants murdered one Oscar s/o Martine. After a full trial was conducted, the appellants were found guilty, hence convicted and sentenced to suffer death by hanging. Dissatisfied, the appellants have preferred this appeal.

When the appeal was called on for hearing, having gone through the record of appeal and before we allowed the learned advocate for the appellants to argue the appeal, we noticed a pertinent procedural irregularity to the effect that the second appellant did not understand "Kiswahili" language instead, he only understood "Kinyambo" as her mother tongue. The record also shows that from the preliminary hearing stage until the stage when the second appellant wanted to give his defence, no interpreter was provided to him and the proceedings of the case were conducted in "Kiswahili" language all the way. We are of the view that,

such procedural irregularity is fatal even if the appellant was represented.

In this appeal, Mr. Josephat Rweyemamu, learned advocate represented the appellants, whereas Mr. Nestory Paschal Nchiman, learned State Attorney represented the respondent /Republic.

In response, Mr. Rweyemamu readily conceded to the issue raised by the Court and further submitted that, it is a fact that the second appellant does not understand "Kiswahili" language, he only understands "Kinyambo". He added that, it does not feature in the record of appeal from the preliminary hearing stage, even when the prosecution case opened, up to the summing up stage that there was an interpreter, interpreting "Kiswahili" language to "Kinyambo" and vice versa. He further added that, even if the second appellant was represented by an advocate at his trial, he was also supposed to follow up what transpired in the proceedings of

his case, considering the gravity of the charges facing him. He further submitted that, in the absence of an interpreter, justice was not done to the second appellant as he failed to understand what was going on before the trial court.

For that reason, Mr. Rweyemamu urged us to invoke the powers of revision conferred upon us under section 4(2) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2002 (the AJA) to nullify the proceedings and judgment of the High Court. Thereafter, quash the conviction and set aside the sentence and order a trial *de novo* before another judge and a new set of assessors. Mr. Rweyemamu also prayed for a new trial to be expedited, because the appellants have been in custody since 2015.

On his part, Mr. Nchimani also conceded to the issue raised by the Court *suo motu* and the submissions made by his learned friend. He too, just like Mr. Rweyemamu submitted that, as it has transpired that the second appellant

did not understand "Kiswahili" language and no interpreter was provided to interpret "Kiswahili" into "Kinyambo" and vice versa, the proceedings and judgment of the trial High Court were null and void. He added that, failure to engage an interpreter for the second appellant who did not understand "Kiswahili" language in the proceedings before the High Court was contrary to the requirements under section 211(1) of the Criminal Procedure Act, Cap. 20 R.E. 2002 (the CPA), hence there was no fair trial done to him.

Thereafter, Mr. Nchimani too urged us to nullify the proceedings and judgment of the High Court, then quash the conviction and set aside the sentence. Finally, he prayed for an order of retrial before another judge and a new set of assessors.

Section 211(1) of the CPA requires that, whenever it appears that an accused person does not understand the language spoken during the proceedings of the case, an

accused person should be provided with an interpreter so as to enable him to understand the proceedings of his case. The omission not to comply with the requirements of section 211(1) of the CPA renders the proceedings of the case null and void. Section 211(1) of the CPA provides as follows:-

" 211-(1) Whenever any evidence is given in a language not understood by the accused and he is present in person, it shall be interpreted to him in open court in a language understood to him."

In a recent decision of this Court in the case of **Joachim Ikwechukwu Ike v. Republic**, Criminal Appeal No. 272 of 2016 (unreported), we quoted the case of **Mpamba Mponeja v. Republic**, Criminal Appeal No. 256 of 2009 (unreported) where this Court held as follows:-

" We have perused the record and noted with concern that at times an interpreter was provided and at times not. We consider this to be a fundamental breach of the appellant's right to understand and follow up proceedings of the case against him. It was a fatal omission."

[See also: **Marko Patrick Nzumikila & Another v. Republic**, Criminal Appeal No. 141 of 2010 (unreported)].

In the case of **Joachim Ikechukwu Ike** (supra) just like in this case, it was learned at an appellate stage that at the trial court though the appellant was represented, but no interpreter was provide to him to interpret "Kiswahili" to the language the appellant understood. Consequently the Court nullified the proceedings and judgment of the trial High Court and quashed the conviction and set aside the sentence.

We have also found it prudent to emphasize the compliance with the requirement provided under section 211(1) of the CPA even to those accused persons who are represented, because there may be instances where even the advocate representing an accused person do not understand the language of his client. The question is how will such an accused person follow up his case and in such a case would there be a fair trial to him?. We think no.

Taking into account the requirement stated in the provisions of section 211(1) of the CPA together with the authorities from the decision of this Court shown above, we are of the view that the effect of such an anomaly renders the proceedings and judgment of the High Court a nullity.

In the event, we are constrained to invoke our revisional powers conferred upon us under section 4 (2) of the AJA to nullify the proceedings and judgment of the trial High Court, quash the conviction and set aside the sentence imposed on

the appellant as in the absence of an interpreter, the second appellant might have been prejudiced. Considering the appellants have been in custody since 2015, we order a retrial to be conducted expeditiously before another judge and a new set of assessors. It is so ordered.


DATED at **BUKOKA** this 24th day of August, 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

