

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

(CORAM: MMILLA, J.A., MUGASHA, J.A., And MWANGESI, J.A.)

CRIMINAL APPEAL NO. 556 OF 2015

1. YOHANA MUSSA MAKUBI
2. ABUUBAKAR NTUNDU**APPELLANTS**

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Bukuku, J.)

**dated the 4th day of November, 2015
in**

HC. Criminal Sessions Case No. 97 of 2012

JUDGMENT OF THE COURT

3rd & 10th July, 2018

MUGASHA, J.A.:

The appellants were charged with and convicted of Murder contrary to section 196 of the Penal Code [Cap. 16 R.E. 2002]. It was alleged that, on unknown date and time in December, 2009 at Songambele – Kirumba area within Ilemela District in Mwanza Region, the appellants murdered one Judith John. The appellants were convicted and sentenced to suffer death by hanging.

Aggrieved, the appellants have appealed to this Court and each appellant filed his own memorandum of appeal. However, for reasons which will be apparent in due course, we shall not reproduce the grounds of appeal.

At the hearing, the 1st appellant was represented by Mr. Constantine Mutalemwa, learned counsel and the 2nd appellant had the services of Mr. Paulin Rugaimukamu, learned counsel. The respondent Republic was represented by Mr. Castus Ndamugoba, learned Senior State Attorney, assisted by Ms. Subira Mwandambo, learned State Attorney.

With leave of the Court, Mr. Mutalemwa rose to address the Court on the propriety of the record of the trial and the present appeal. He pointed out that, the taking of the evidence at the trial was irregular because after the conclusion of the testimony of every witness the trial judge did not append her signature. In this regard, he submitted that, the omission tainted the entire proceedings which are rendered not authentic. He pointed out that, the manner of recording the evidence in criminal trials before the High Court is regulated by section 215 of the Criminal Procedure Act [**CAP 20 RE.2002**] (the CPA) and **THE CRIMINAL PROCEDURE (RECORD OF**

EVIDENCE) (HIGH COURT) RULES GOVERNMENT NOTICES NO.28 of 1953 and 286 of 1956. However, the requirement of signing the evidence taken down is not a mandatory requirement as opposed to section 210 (1) (a) of the CPA which makes the signing mandatory to the trial magistrate. In this regard, Mr. Mutalemwa urged us to take inspiration from section 210(1) (a) of the CPA in order to address the incurable irregularity whereby the evidence of all the witnesses taken down was not signed by the trial judge. He argued that, the omission renders the trial proceedings not authentic and such proceedings do not constitute part of the record of the trial and the appeal before the Court.

Thus, Mr. Mutalemwa urged us to invoke our revisional power under section 4(2) of the Appellate Jurisdiction Act [**CAP 141 RE.2002**] (the AJA) to nullify the trial proceedings, set aside the sentence and order a retrial.

Mr. Rugaimukamu apart from subscribing to Mr. Mutalemwa's submission, urged the Court to give a direction to the High Court on the proper manner of taking and recording the evidence in a criminal trial.

On the other hand, Mr. Ndamugoba conceded to the shortfall adding that, in the wake of missing trial judge's signature at the conclusion of the testimonial account of every witness, the authenticity of the record and in particular, the evidence itself is questionable. Apart from subscribing to the remedial measure proposed by the learned counsel for the appellants, he urged us to spare the Preliminary Hearing proceedings as they have not been tainted by the omission in question.

In rejoinder, Mr. Mutalemwa supported the idea of salvaging the Preliminary Hearing proceedings as they have not been affected by the procedural irregularity which is complained of.

We now look at what transpired at the trial before the High Court. The trial commenced on 5/3/2013 whereby four prosecution witnesses: UMMI JUMA (PW1), MUHAJI IDD (PW2), CHRISTINA MAKENE (PW3) and MOHAMED HASSAN (PW4) testified as reflected from pages 11 to 19 of the record. However, at the end of the testimony of every witness, the trial judge did not append her signature. The trial was adjourned to 6/3/2014 whereby IMELDA FESTUS (PW5) and S/SGN GASPER (PW6) testified as reflected from

page 21 to 25 of the record. At the conclusion of evidence of each the trial judge did not append her signature.

Also S.5655 D/SSGT DIWANI (PW7) and D.8674 D/CPL AGIDIUS (PW8) both initially gave their partial testimonial account and completed after the Rulings on the admissibility of the statements of the appellants. At the trials within trial those who testified on the propriety or otherwise of the cautioned statements of the appellants were D. 5655 D/SSGT DIWANI and D.8674 D/CPL AGIDIUS for the prosecution and the appellants on the other hand. Again, the trial judge did not append her signature on the evidence of witnesses taken down at the trial within trial. Dr. MGENDI KIHITA MBAGA who testified as PW9 his evidence also faced a similar predicament as reflected at page 60 to 61. The trial judge did not append her signature at the end of PW9's account besides, making an order in respect of admitting the Postmortem Examination Report (Exhibit P4).

The defence case was also not spared as reflected at page 65 to 70 of the record of appeal whereby at the end of the testimony of each appellant the trial judge did not append her signature.

The issue for our determination is the propriety or otherwise of the trial proceedings before the High Court.

We begin with the position of the law by looking at section 215 of the CPA which provides:

"The High Court may, from time to time, by rules prescribe the manner in which evidence shall be recorded in cases coming before the court and the evidence or the substance thereof shall be taken down in accordance with those rules."

The Rules are prescribed in Government Notices Nos. 28 of 1953 and 286 of 1956 which regulate basically the manner of recording of evidence whereby Rule 3 states as follows:

"In all trials of criminal cases before the High Court the record of the evidence of each witness shall consist of-

(a) a record or memorandum of the substance of the evidence taken down in writing by the Judge, which shall not ordinarily be in the form of question and answer but in the form of narrative:

(b) a typewritten transcript of shorthand record of the evidence, made in accordance with the provisions of rules 4 and 5 of these Rules; or

(c) partly a record or memorandum made in accordance with paragraph (a) of this rule and partly a typewritten transcript made in accordance with paragraph (b) of this rule."

Section 210(1) (a) of the CPA which regulates the mode of taking evidence in the subordinate courts provides as follows:

"(1) In trials, other than trials under section 213, by or before a magistrate, the evidence of the witnesses shall be recorded in the following manner—

(a) the evidence of each witness shall be taken down in writing in the language of the court by the magistrate or in his presence and hearing and under his personal direction and superintendence and shall be signed by him and shall form part of the record;"

Section 210 (1) (a) of the CPA is very much similar to section 356 of the Indian Criminal Procedure Code which states as follows: -

"In trials before courts of sessions and inquiries under Chapter XII, the evidence of each witness shall be taken down in writing in the language of the court by the magistrate or Sessions Judge, or in his presence and hearing and under his personal direction and superintendence and shall be signed by the Magistrate or sessions Judge."

What obtains in India as a rule of law is in our jurisdiction a long established rule of practice as part of the procedure in the proper administration of criminal justice before the High Court. The aspect of the long established rule of practice was considered and well embraced in the case of **LAURENT SALU AND FIVE OTHERS VS THE REPUBLIC**, Criminal Appeal No. 176 of 1993 (unreported), where the Court was confronted with a situation whereby the trial judge did not involve the appellants in the selection of assessors as he did not give them opportunity to say whether or not they objected to any of the assessors, and there was no such indication on the record. The Court made the following observation:

"Admittedly the requirement to give the accused the opportunity to say whether or not he objects to any

of assessors is not a rule of law. It is a rule of practice which, however, is now well established and accepted as part of the procedure in the proper administration of criminal justice in this country. The rationale of the rule is fairly apparent. The Rule is designed to ensure that the accused person has a fair hearing”.

Thus, the Court held:

"In the instant case, it is not known if any accused persons had any objection to any of assessors, and to the extent that they were not given the opportunity to exercise that right, that clearly amounted to an irregularity."

The principle was emulated in the recent case of **CHACHA MATIKO @ MAGIGE VS THE REPUBLIC**, Criminal Appeal No. 562 of 2015 (unreported) whereby non involvement of the assessors amounted to an incurable irregularity and the trial was nullified.

Since it is a rule of long established practice that in a criminal trial after taking down the evidence of every witness the trial judge

must append his/her signature, we had to ponder on the essence of the missing signature which was dealt with in the case of **WALII ABDALLAH KIBITWA AND TWO OTHERS VS REPUBLIC**, Criminal Appeal No. 181 of 2006 (unreported). The Court asked itself as to how it can ascertain the contents of the confession statement which was not signed by the appellant. The Court found this to be a serious irregularity having referred to Mitra's Legal & Commercial Dictionary (5th edition), where it is stated:

"Speaking generally a signature is the writing or otherwise affixing a person's name or mark to represent his name by himself or by his authority with the intention of authenticating a document as being that of or as binding on the person whose mark is so written or affixed."

The Court thus disregarded the unsigned cautioned statement as it did not reflect any mark of the owner.

We fully subscribe to **WALII ABDALLAH KIBITWA's** case.

In the matter before us, it was the complaint of the learned counsel for the appellants that, the evidence of witnesses which is

not signed by the trial judge is not authentic. In a bid to ascertain the meaning of the words authentic, authenticate and authenticity we made reference to the **SHORTER OXFORD ENGLISH DICTIONARY** printed in Great Britain at the University Press, Oxford by Vivian Ridler which avails the following meaning to the ascribed words:

Authentic:

1. One who does a thing himself, of authority, authoritative, entitled to obedience or respect, 2. legally valid, legally or dully qualified, 3. Entitled to belief, as being in accordance with or stating fact; reliable, trustworthy, of established credit; 4. Original first-hand 5. Real, actual, genuine. 6. Really proceeding from its reputed source or author;

Authenticate-

1. To invest with authority; To give legal validity to; 2. To establish the title to credibility of a statement. 3. To establish the genuineness of.

Authenticity-

1. The quality of being authentic, as being authoritative or duly authorised, 2. As being true in substance.3. As being genuine; genuineness 4. As being real actual; reality.

In the light of what the Court said in **WALII ABDALLAH KIBITWA's** and the meaning of what is authentic, can it be safely vouched that the evidence recorded by the trial judge without appending her signature made the proceedings legally valid? The answer is in the negative. We are fortified in that account because, in the absence of the signature of the trial at the end of the testimony of every witness: **Firstly**, it is impossible to authenticate who took down such evidence. **Secondly**, if the maker is unknown then, the authenticity of such evidence is put to question as raised by the appellants' counsel. **Thirdly**, if the authenticity is questionable, the genuineness of such proceedings is not established and thus; **fourthly**, such evidence does not constitute part of the record of trial and the record before us.

We emphasise that, the rationale of the stated long established rule of practice as part of the procedure in the proper administration of criminal justice in this country is quite apparent

geared at ensuring that at any given time, the court proceedings are authentic which is pertinent in the prompt delivery of justice.

We are thus, satisfied that, failure by the judge to append his/her signature after taking down the evidence of every witness is an incurable irregularity in the proper administration of criminal justice in this country. The rationale for the rule is fairly apparent as it is geared to ensure that the trial proceedings are authentic and not tainted. Besides, this emulates the spirit contained in section 210(1) (a) of the CPA and we find no doubt in taking inspiration there from.

In view of the stated omission the trial proceedings of the High Court were indeed vitiated and are a nullity and neither did they constitute the record of the trial and the appeal before us. We are thus satisfied that before us there is no material proceedings upon which the appeal could be determined. In this regard, we agree with the learned counsel and therefore invoke our jurisdiction under Section 4(2) of the AJA, quash the judgment, the trial proceedings of the High Court commencing from 5th March, 2014. The proceedings in respect of the Preliminary hearing are salvaged because they have not been affected by the said omission. Thus, in

the interest of justice, we order an expedited retrial before another judge with a different set of assessors. Meanwhile, the appellants shall remain in custody.

DATED at MWANZA this 7th day of July, 2018.

B. M. MMILLA
JUSTICE OF APPEAL

S. E. A. MUGASHA
JUSTICE OF APPEAL

S. S. MWANGESI
JUSTICE OF APPEAL

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


B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL