

**IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM**

(CORAM: MWARIJA, J.A., KOROSSO, J.A. And KEREFU, J.A.)

CRIMINAL REVISION NO. 4 OF 2019

THE REPUBLIC APPLICANT

VERSUS

ABDALLAH SALUM @ HAJI RESPONDENT

**(Revision from the proceedings of the Resident Magistrate's Court of
Morogoro, at Morogoro)**

(Rusema, PRM- Extended Jurisdiction)

**dated the 11th day of August, 2014
in**

Criminal Sessions Case No. 19 of 2013

.....

RULING OF THE COURT

14th August, & 10th September, 2019

KOROSSO, J.A.:

This revision initiated *suo motu* in terms of section 4(3) of the Appellate Jurisdiction Act, Cap 141 RE 2002 (the AJA) arises from the proceedings of court of Resident Magistrate in Morogoro Region sitting at Morogoro (Kwey Rusema Principal Resident Magistrate with Extended Jurisdiction (PRM-EJ) in Criminal Sessions Case No. 19 of 2013. Available records reveal that a letter to the Chief Justice from B. R. Mutungi, J., the Judge Incharge of High Court Dar es Salaam District Registry (J.Incharge

Dsm) led to the following orders by the Hon. Chief Justice issued on the 01st April, 2019:

"Revisional proceedings be initiated suo motu in respect of the captioned proceedings".

It is on record that while conducting routine inspections, the J.Incharge Dsm upon perusing through court records discerned what she formed an opinion to be procedural errors in the conduct of Preliminary Hearings in four Criminal session case proceedings, that is; Criminal sessions case No. 11 of 2014, **Republic vs Jumanne Mustapha @Likata**; Criminal Sessions Case No. 14 of 2014, **Republic vs Timoth Antony @Mndewa and 2 others**; Criminal Sessions Case No. 16 of 2014, **Republic vs Francis Ujenga**; and Criminal Sessions Case No. 19 of 2013, **Republic vs. Abdallah Salumu @Haji**, conducted at the court of Resident Magistrate's Morogoro, at Morogoro by Kwey Rusema, PRM- EJ.

The J.Incharge Dsm being convinced that there was non-compliance of the provision of Section 192(3) of the Criminal Procedure Act, Cap 20 RE 2002 (CPA) by the trial court, based on the fact that the respective criminal sessions proceedings did not reveal that the memorandum of agreed facts were read over and explained to the accused persons, and also believing

that the anomalies found are incurable procedural irregularities by virtue of the decision of this Court in **Republic vs Peter Jocktan @Isinika @Chinga and John Peter @Mikika Spencer**, Criminal Appeal No. 293 of 2016 (unreported). It is on record that thereafter Mutungi J., forwarded her findings to the Honourable Chief Justice for guidance and direction in a letter with Reference Number DA.96/273/01/74 dated 14th August, 2017 and that the end result of this process is the current criminal revision. It is important to also understand that this revision emanates from Criminal Sessions case No. 19 of 2013, one of the criminal sessions proceedings alleged to have procedural irregularities in the conduct of the Preliminary Hearing.

On the date set for hearing, respective parties were called upon to appear before this Court and submit their positions with regard to issues that prompted the Court to undertake the current proceedings, and the Republic was represented by Ms. Anna Chimpaye assisted by Ms. Monica Ndakidemi, learned State Attorneys, and Mr. Paschal Kamala, learned Advocate appeared for Abdallah Salum @Haji. For expediency purposes we shall henceforth refer the Republic as the applicant and Abdallah Salum @Haji as the respondent.

The counsel for the applicant Ms. Chimpaye when presenting her submissions to the Court, relied on the issues raised by the Judge Incharge Dar es Salaam which initiated the obtaining proceedings, and intimated the fact the applicants were in support of the revision proceedings, contending that the trial records reveal that section 192(3) of the CPA was contravened. The learned State Attorney thus prayed that pages 58 and 59 of the typed proceedings of the record of appeal presenting record of the conduct of Preliminary Hearing of case against the respondent (the accused in the trial court) be nullified. She argued that since the trial court was yet to fully start the trial, that is hearing of witnesses, no party will be prejudiced if the record on the Preliminary Hearing will be nullified, and that in fact it is then that justice will be done. The learned counsel also implored the Court to rely on the decisions of this Court cited in the comments by the Deputy Registrar regarding this matter found at page 7 of the record of appeal,, that is; **Republic vs Peter Joctan @Isinika @Chinga** (supra) and **Joseph Munene and Another vs Republic**, Criminal Appeal No. 109 of 2002.

On the part of the counsel for the respondent, he registered his support for the learned State Attorney submissions, arguing that there is

no doubt that there was contravention of Section 192(3) of the CPA by the trial court. Referring this Court to page 58 of the record of appeal, the counsel contended that what is revealed is that the trial court failed to record the facts submitted by the prosecution, and the said facts were not read over to the accused person then (the respondent), and neither were the matters identified to be not disputed, explained to the respondent, which would if properly done, have then led to the respondent signing on the matters not disputed.

Mr. Kamala stated further that this anomaly contravenes the procedure and is fatal, relying on the holding in **Republic vs Peter Jocktan@Isinika @ Chinga** (supra), at page 21 of the record of appeal, the Court states that, such contravention is fatal and leads to nullification of proceedings. The counsel for the respondent thus besought the Court to nullify the trial court's proceedings particularly those at page 58 and 59 on the conduct of Preliminary Hearing and order Preliminary Hearing to be conducted afresh. There was no rejoinder from the applicant's counsel.

Having heard and carefully considered submissions from the applicant and respondent counsel, on our part, we find that the main issue

for consideration is whether the conduct of the Preliminary Hearing related to Criminal Sessions No. 19 of 2013, **Republic vs Abdallah Salum @Haji**, which is the subject of the present revision, found at pages 58 and 59 of the record of appeal was proper within the confines of the law and if not proper the consequence thereto.

At the same time we are of the view that for better understanding of the sequence of events on what transpired during the conduct of the impugned proceedings, on the respective day particularly the Preliminary Hearing, it will be useful to reproduce the relevant proceedings found from page 57 then move to pages 58 and 59 which reads as follows:

Page 57 of record of appeal

11/08/2014

Coram: Hon. Kwey Rusema, PRM (Ext. Jurisdiction)

For the Republic: Mr. Bantulaki

For the Defence: Mr. Masawe

Accused: Present in Person

Cc: Imakulata

Information of Attempted murder read over and explained to the accused person in own language and he is required to plead there to:

Accused plea: It is not true

Court: Entered as a plea of not guilty

Sgd: Kwey Rusema

PRM (Ext. Jurisdiction)

11/08/2014)

Page 58 of the record of appeal

Mr. Bantulaki: I am ready for preliminary hearing. I have written facts. I pray the same to be part of this court record

Mr. Masawe: No objection

Court: Statement of facts to be part of the court record

Mr. Bantulaki: I am ready to read the facts to accused

Court: Facts read to accused

Mr. Bantulaki: We intend to tender the PF3 as exhibit

Sgd: State Attorney

Court: PF3 exhibit P.1

Mr. Bantulaki: We intend to call seven witnesses as they appear on the facts

MEMORANDUM OF UNDISPUTABLE FACTS

- 1. The name of the accused*
- 2. The accused is facing an offence of attempted murder*
- 3. That Mwajuma Nestor was issued with a PF3 and was drinking beer with Razaki*

Page 59 of Record of Appeal

SGD: Accused person

SGD: State Attorney

SGD: Defence counsel

Mr. Bantulaki: I pray for an adjournment

Order: Case is adjourned for hear at the next session to be fixed by the Registrar.

SGD: Hon. Kwey Rusema

PRM (Ext. Jurisdiction)

11/08/2014

Having imported the above record of the proceedings related to conduct of Preliminary Hearing in Criminal Sessions Case No.19 of 2013, we now move to expound from the law and various decisions of this Court, the purpose of and proper conduct of the Preliminary Hearing in criminal trials.

Section 192 of the CPA as amended by Act No. 3 of 2011 and also the Rules found in GN 192 of 1988 are relevant. Section 192 (1) (2) and (3) provide as follows:

"192 (1) Notwithstanding the provisions of section 229 and 283, if an accused pleads not guilty the court shall as soon as convenient, hold a preliminary hearing in open court in the presence of the accused and his advocate (if he is 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 expeditious trial.

(2) In ascertaining such matters that are not in dispute the court shall explain to the 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 it 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)

(5)

(6)”

At the hearing of this revision, from their submissions and averments, both counsel for the applicant and respondent are in agreement that the memorandum of facts not in dispute drawn by the trial court were not read to the respondent during Preliminary Hearing, a fact which we find undisputed having gone through the record of trial court’s proceedings during conduct of Preliminary Hearing. It is clear that after the court had drawn the Memorandum of undisputable Facts, the record shows that thereafter, the respondent, the learned State Attorney and learned defence counsel signed it. However, there is nothing on record showing that before signing the memorandum, the undisputable facts were read over and explained to the respondent in a language he understands as prescribed under Section 192(3) of the CPA. There is also nothing showing that the PRM (extended Jurisdiction) explained to the accused person about the nature of the Preliminary Hearing in line with Section 192(2) of CPA.

In the case cited by the counsel for the parties, that is **Republic vs Peter Joctan @Isinika @ Chinga and another** (supra) in which the Court adopted the holding in **Hamimu Hamisi Totoro Zungu Pablo and Two Others vs Republic**, Criminal Appeal No. 170 of 2004 (unreported) where the Court was faced with a situation of a defective Preliminary Hearing and held:

"... We have studied the proceedings of this day and we are satisfied that they were not conducted properly. In terms of section 192 of the Criminal Procedure Act, (CPA) both the accused and the prosecutor have to agree to the memorandum of undisputed facts before such facts are recorded as being undisputed".

Having found that failure to comply with section 192 of CPA in the conduct of a preliminary hearing is a fundamental irregularity, the Court invoked its revisional jurisdiction and nullified, quashed and set aside the entire preliminary hearing proceedings. Another decision of this Court was in **Kanuda Ngasa @ Kingolo Mathias vs Republic**, Criminal Appeal No. 247 of 2006 (unreported), where one of the grounds of appeal was failure to comply with sections 192 (3) of the CPA and the Court held;

“It is trite law that failure to prepare a memorandum of undisputed facts, or to read and explain the contents of the said memorandum to the accused is non-compliance with the mandatory provisions of the law. Where there is such non-compliance, as rightly argued by Mr. Magongo and Mr. Kakwaya, the provisions of subsection (4) do not come into play. Nothing shall be deemed to have been proved”

From the above holdings it is clear that failure to read and explain to an accused person the memorandum of undisputed facts is non-compliance with section 192 (3) of CPA, and that, it is the same as having not conducted a Preliminary Hearing.

It should also be borne in mind that as the record reveals, after the prosecution had prayed to tender the PF3 the Court stated PF3, the trial court admitted it as exhibit P.1 without even giving the defence an opportunity to object or support and thus in effect, admitted into evidence an exhibit without giving the defence an opportunity to give their position contrary to established procedures. In the memorandum of undisputable facts drawn by the trial PRM (EJ), fact number three establishes as a fact that one Mwajuma was issued with a PF3, a fact which is nowhere shown

in the proceedings that it was agreed by the defence. This without doubt is also a procedural irregularity as expounded by this Court in **MT 479 Sgt.**

Benjamin Holela vs R [1992] T.L.R 121 where at page 124 it held:-

"...in case where matters (i.e agreed matters) comprise documents, the contents of the documents must be read and explained to the accused... so as to ensure that he or she is in a position to give an informed response"

With the above expounded procedural anomalies, it goes without saying that the Preliminary Hearing was not conducted properly and contravened mandatory provisions that is, section 192(3) of the CPA, and that the discerned procedural irregularities are fatal and incurable.

In the premises, the entire Preliminary Hearing Proceedings in Criminal Sessions case No. 19 of 2013 found at page 58 and 59 of the record of appeal conducted at the Resident Magistrate's Court of Morogoro at Morogoro on the 11th of August 2015 by Kwey Rusema PRM (E J) are hereby nullified, quashed and set aside.

We further direct that the trial in Criminal Sessions Case No. 19 of 2013 should as soon as practicable, begin afresh at the stage of Preliminary Hearing. Order Accordingly.

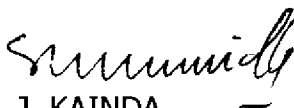
DATED at **DAR ES SALAAM** this 5th day of September, 2019.

A. G. MWARIJA
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

The Ruling delivered this 10th day of September 2019 in the presence of Ms. Kombakono Mwanaamina Senior State Attorney for the Applicant and Capt. Ibrahim Bendera holding brief for Mr. Paschal Kamara, Counsel for the Respondent is hereby certified as a true copy of the original.


S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL