IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MZIRAY, J.A., KWARIKO, J.A. AND MWANDAMBO, J.A.)

CRIMINAL APPEAL NO. 268 OF 2017

CASTOR MWAJINGA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Mwarija, J.)

dated the 17th day of July, 2012
in
Criminal Sessions Case No. 80 of 2010

JUDGMENT OF THE COURT

10th & 24th June, 2020

MWANDAMBO, J.A.:

Castor Mwajinga, the appellant herein, stood trial before the High Court of Tanzania sitting at Morogoro on the information of murder contrary to section 196 of the Penal Code [Cap.16 R. E. 2002 – now R.E 2019]. It was alleged by the prosecution that on or about 22nd April, 2008, at Mashambani Mahambwa, Mgeta Village within Kilombero District, Morogoro Region, the appellant murdered one Verasto Mbande to which he pleaded not guilty. After the trial consisting of five witnesses for the prosecution and one for the defence, the trial court

became satisfied that the prosecution adduced sufficient evidence proving the case against the appellant on the required standard. It found the appellant guilty as charged followed by conviction and the mandatory death sentence. Dissatisfied, the appellant is now before the Court contesting the conviction and sentence.

The facts leading to the appellant's arraignment and conviction may be stated in brief. They are as follows: The appellant and one Edward Chanja @ Njeula (PW1) were close relatives who, until the material date, stayed in the same house at Mashambani Mahambwa, Mgeta Village. Verosta Mbande, a young girl aged 5 years (now deceased) was also a close relative staying in the same house with the appellant. On 22nd April 2008 in the morning, the appellant and PW1 went somewhere in the farms for cutting trees. They left behind the deceased and returned at/about 1:00 p.m. in good time for lunch after the day's work. However, they could not see food in the kitchen particularly fish to be taken with ugali as side dish. Upon enquiry, the deceased confessed to have eaten the fish because she felt hungry. That did not amuse the appellant who reacted by inflicting corporal punishment on the deceased using a stick which PW1, described to be soft and thin from a pigeon pea tree. Within a moment, a neighbour

going by the name of Bryson Kigawa (PW5) intervened pleading with the appellant to stop caning the deceased to which he obliged. It would appear the appellant's anger had not yet cooled off, for according to PW1, he boiled water which PW1 believed to be for preparing ugali but instead, he is said to have poured it on the deceased's waist, thighs and legs standing three meters away. Nonetheless, the deceased continued with her life normally at least for two days during which PW1 was around before departing to his aunt; the deceased's mother at Mchome village and later to Mbande Village. However, PW1 did not disclose anything to his aunt allegedly for fear of facing the same ordeal from the appellant by reason of the threats he had made to him on 22nd April, 2008.

Five days later, on 27th April, 2008 to be exact, the deceased was taken to St. Francis Hospital for treatment but it was too late to save her life, for she was pronounced dead on arrival. The deceased's body was taken to a relative at Tazara quarters where Jane Damas Kahigwa (PW2) a Clinical Officer with St. Francis Hospital, examined it and posted her findings in a Postmortem Report (Exhibit P1). According to PW2, the deceased's body had wounds caused by burn on the thighs, buttocks and legs. She concluded that the wounds resulted from scald burns and

peeling off of the skin. In PW2's opinion, the cause of the death of the deceased was severe burn of about 50%. Subsequently, PW1 was summoned to record a statement at the police in connection with the deceased's death and eventually, the appellant was arrested and arraigned before the trial High Court on the information of murder of the deceased.

During the trial, apart from PW1 and PW2, who were in the list of three witnesses the prosecution intended to call at the trial, three other witnesses testified for the prosecution namely; Venance Mbaga (PW3), WP 293, D/CPL Joyce (PW4) and Brayson Kigawa (PW5). The appellant testified in defence through unsworn testimony denying any involvement in pouring hot water on the deceased. Instead, the appellant told the trial High Court that he only massaged the deceased with warm water upon sustaining injury after falling down from a storey hut. However, he admitted having canned the deceased after eating fish using a stick from a pigeon pea tree. The trial court rejected the appellant's defence upon being satisfied that it did not succeed in punching holes in the watertight evidence adduced by the prosecution. At the end of it all, the appellant was found guilty as charged and convicted accordingly earning the deserving death sentence now being challenged in this appeal.

Initially, the appellant had preferred his appeal predicated on three (3) grounds of appeal followed by a supplementary memorandum containing three (3) grounds. In terms of rule 73 (2) of the Tanzania Court of Appeal Rules (the Rules), on 29th May 2020 prior to the hearing of the appeal, Mr. Nehemiah Nkoko, learned advocate assigned to represent the appellant, lodged a supplementary memorandum of appeal containing six grounds in substitution for the memorandum of appeal lodged earlier by the appellant. The learned advocate informed the Court at the commencement of the hearing of the appeal that he had obtained express consent from the appellant to argue the appeal on the basis of the supplementary memorandum containing six grounds. Paraphrased, the appeal is predicated on the following areas of complaint:

1. *The trial court received the evidence of PW3, PW5 and PW5 who were not listed as such during the committal proceedings contrary to section 246 (2) and 289 (1) of the Criminal Procedure Act, [Cap 20 R. E. 2019], henceforth the CPA;*
2. *The contents of the Postmortem Report (exhibit P1) were not read out upon it admission;*

3. *No independent evidence proving that it is the appellant who killed the deceased other than that of PW2 which was contradictory regarding the cause of death of the deceased;*

4. *The decision and the proceedings of the High Court were vitiated because the appellant was not committed to the High Court for trial contrary to section 246 (1) of the CPA;*

5. *The case against the appellant was not proved beyond reasonable doubt because PW1 was not a reliable witness whose evidence required corroboration;*

6. *Irregularity in the selection of assessors and improper summing up to them.*

At the hearing of the appeal, Mr. Nehemiah Nkoko appeared representing the appellant whilst Ms. Lilian Itemba, learned Principal State Attorney did alike for the respondent Republic resisting the appeal. In arguing the appeal, Mr. Nkoko combined his arguments in ground 1 and 4 and argued ground 6 separately. However, for reasons which will become apparent later, we shall not make reference to Counsel's argument in ground 6 neither will we address it in this judgment.

Submitting in ground 1 and 4, Mr. Nkoko argued that the proceedings before the High Court are fatally irregular on two fronts. One, the appellant was not committed to the High Court for trial contrary to the mandatory provisions of section 246 (1) of the CPA and in consequence, the trial without an order committing the appellant was a nullity and so were the conviction and the sentence. Going forward the learned advocate urged the Court to exercise its powers under section 4 (3) of the Appellate Jurisdiction Act [Cap. 141 R.E 2019] by quashing the proceedings and the conviction followed by an order setting aside the sentence.

Taking the argument further, the learned advocate contended that whilst nullification of the proceedings before High Court and the resultant decision will result into ordering a retrial, the circumstances in this appeal dictate otherwise. In elaboration, Mr. Nkoko pointed out shortcomings in the evidence of both PW1 and PW2, the only remaining witnesses which he contended that is too wanting to prove the case against the appellant on the standard required in criminal cases. The learned advocate singled out two of the alleged shortcomings from PW1's testimony that is to say; keeping quiet and failing to disclose the ordeal to the deceased's mother at a time he was no longer in any

danger from the alleged threats from the appellant; two, PW1's evidence at p.30 shows that he did not see any injuries from the deceased two days after the incident and that she was eating and walking normally which meant that the pouring of hot water was a word by PW1 against that of the appellant who had a different version of the incident.

Regarding PW2's evidence, the appellant's learned advocate criticized it for being contradictory in relation to the cause of death between scald burns and septicaemia featuring in her testimony. Additionally, he criticized PW2 for being uncertain as to whether it was septicaemia or hypovolemic shock. This was more so when by her own testimony she told the trial court that the hospital had no sufficient equipment to facilitate a proper diagnosis of the deceased's body and confirmed in re-examination that she only conducted physical examination of the deceased's body. Furthermore, there is no evidence from PW2 as to the date on which the deceased died. According to the learned advocate, the shortcomings raise serious doubts in the prosecution's evidence which ought to have benefited the appellant.

With the foregoing submissions, Mr. Nkoko abandoned ground 2 and felt unnecessary addressing us on ground 3 and 5 because,

according to him they were covered in the submissions in ground 1 and 4.

With regard to the irregular reception of evidence of PW3, PW4 and PW5, the learned advocate submitted that section 246 (2) of the CPA imposes a duty on the committing court to read the substance of the evidence of witnesses whom the prosecution intends to call at the trial. However, the learned advocate argued, neither did the prosecution include in the list of prospective witnesses the names of PW3, PW4 and PW5 nor was the substance of their evidence read before the subordinate court as required by section 246 (2) of the CPA. Accordingly, the reception of the evidence of such witnesses was contrary to section 289 (1) of the CPA and thus the improperly received evidence ought to be expunged, the learned advocate argued.

As alluded to earlier, Ms. Itemba resisted the appeal notwithstanding the irregularities pointed out by the appellant's learned advocate. For a start, she conceded to the non- compliance with section 246 (2) and 289 (1) of the CPA that the reception of the evidence of the witnesses who were neither listed as such nor was the substance of their evidence read before the committing court was a fatal irregularity. She readily agreed that the evidence of PW3, PW4 and

PW5 received in non- compliance with section 246 (2) and 289 (1) of the CPA be expunged from the record.

We are inclined to agree with both learned counsel on the consequences flowing from irregular reception of evidence contrary to section 289 (1) of the CPA. However, for reasons which will become apparent later, we do not think it will be necessary to go further and do what the learned Counsel urged us to do, that is to say; expunging the improperly received evidence from the record. Despite the improper evidence we have just referred to, Ms. Itemba argued that the remaining evidence is sufficient to sustain conviction. This is so, the learned Principal State Attorney argued, PW1 was an eye witness who saw the appellant pouring hot water on the deceased and thus his evidence did not require any corroboration. Secondly, she argued that the evidence of PW2 who examined the deceased's body proved that the cause of death was burning at the rate of 50%. At any rate, Ms. Itemba contended that cause of death cannot necessarily be proved by a post mortem report placing reliance on the Court's decision in **Mathias Bundala v. R**, Criminal Appeal No. 62 of 2004 (unreported). As to the date of death, the learned Principal State Attorney argued that the omission was curable by section 234 of the CPA discussed in

Tulisangeyeko Alfred & 2 Others v. R, Criminal Appeal No. 282 of 2006 (unreported).

Regarding the absence of the committal order, Ms. Itemba conceded the omission but she argued that the absence of it was not necessarily mandatory rendering the trial of the appellant a nullity as submitted by the appellant's advocate. In support of that argument, the Court was referred to its previous decision in **Bahati Makeja v. R**, Criminal Appeal No. 118 of 2006 (unreported) for the proposition that the use of the word shall in a statute does not necessarily mean that it is imperative more so when there is no proof of failure of justice by reason of the omission. In this appeal, Ms. Itemba argued, the essence of committal proceedings is to enable the accused understand the substance of the prosecution evidence which was read to him and so the omission to make a committal order was innocuous. However, the learned Principal State Attorney admitted that the lack of the committal order had a bearing on the jurisdiction of the High Court to try the appellant.

Submitting in rebuttal, Mr. Nkoko urged the Court to find the irregularity in the committal proceedings very fundamental and thus incapable of being cured by section 388 of the CPA. This is so, the

learned advocate argued, the omission had the effect of denying the appellant opportunity to say something in the committal proceedings. For that matter it was Mr. Nkoko's submission that **Bahati Makeja's** case (supra) was inapplicable because the extent of the omission in that case was minor compared to the wanting committal order in the instant appeal having a bearing on the trial court's jurisdiction.

Regarding the sufficiency of PW2's evidence, Mr. Nkoko reiterated his stance and argued that it was inherently inconsistent and contradictory on the cause of death. The learned advocate attacked PW1's evidence for making different answers on the same question particularly the time he went to the police to record his statement.

From our examination of the proceedings and the judgment of the trial court in the light of the grounds of appeal and arguments for and against, it is plain that the subordinate court before which the appellant appeared for inquiry did not commit him for trial as conceded to by the learned Principal State Attorney. The only issue is whether the failure to commit the appellant was fatal to the trial and the eventual conviction and sentence meted out to the appellant and if so, the course of action to be taken by the Court. We may be excused for not addressing all issues canvassed by the learned Counsel in their submissions because

we are settled in our mind that the complaint in ground 4 will be sufficient to dispose of the appeal.

The appellant's complaint is predicated under the provisions of section 246 of the CPA which stipulates:-

> "246 (1) *Upon receipt of the copy of the information and the notice, the subordinate court shall summon the accused person from remand prison or, if not yet arrested, order his arrest and appearance before it and deliver to him or to his counsel a copy of the information and notice of trial delivered to it under sub-section (7) of section 245 and commit him for trial by the court, and the committal order shall be sufficient authority for the person in charge of the remand prison concerned to remove the accused person from prison on the specified date and to facilitate his appearance before the court.*
>
> *(2) Upon appearance of the accused person before it, the subordinate court shall read and explain or cause to be read to the accused person the information brought*

against him as well as the statements or documents containing the substance of the evidence of witnesses whom the Director of Public Prosecutions intends to call at the trial.

(3) After complying with the provision of subsections (1) and (2) the court shall address the accused person in the following words or words to the like effect:

> *"You have now heard the substance of the evidence that the prosecution intends to call at your trial. You may either reserve your defence, which you are at liberty to do, or say anything which you may wish to say relevant to the charge against you. Anything you say will be taken down and may be used in evidence at your trial."*

(4) n.a

(5) *Everything that the accused person says shall be recorded in full and shall be shown or read over to him and he shall be at liberty to explain or add to anything contained in the record thereof.*

(6) n.a"

That section has to be read with section 178 and 249 of the same Act. Section 178 provides:

> s.178: *The High Court may enquire into and try any offence subject to its jurisdiction in any place where it has power to hold sittings.* ***Save that except under Section 93, no criminal case shall be brought under cognisance of the High Court unless the same shall have been previously investigated by a subordinate court and the accused person shall have been committed for trial before the High Court.*** [Emphasis added].

Luckily, this Court has had occasion to pronounce itself on a similar issue in **The Republic v. Asafu Tumwine**, Criminal Revision No. 1 of 2006 (unreported). It aptly stated:-

> *"In view of the above, we are now settled in our minds that a purposive construction of sections 178, 246 (1) and 249 of the Act makes it explicit that the scheme and spirit behind the law in making provision for the holding of preliminary inquiries in cases of this nature presupposes the making of a specific order committing the accused for trial before the High Court. Where there is no such order ... there is no proper commitment and the High Court cannot try the case."*

The Court reiterated that stance in **Republic v. Dodoli Kapufi,** Criminal Revision No. 1 of 2008 (unreported) involving an application for bail pending trial before the respondent was committed to the High Court for trial.

The proceedings before the committing District Court of Kilombero District in P.I No. 7 of 2008 at page 20 and 20a of the record appeal reveal the following:

> *"Date: 17/5/2011*
>
> *Coram: P.I Kimicha- RM*
>
> *Pros: A/Insp. Nasoro*
>
> *Accused:* ***Absent***
>
> *B/Clerk: J. Nkombe- R/A*
>
> *Pros: We ha [ve] received the information of the offence of Murder u/s [1] 96 of the Penal Code. I pray to proceed with the committal proceedings against the accused.*
>
> ***Court****: Information for a charge of Murder u/s 196 of the Penal Code read over to the accused person who is not allowed to plead thereto u/s 245(3) of the C.P.A*
>
> ***Prosecutor****: at the trial court at the High Court we intend to call four witnesses as follows:-*

List of prosecution witnesses:

(1) Jane d/o Kaigwa

(2) Consolata

(3) Edward Chenja@ Njeula

Court: The above mentioned witness statements read over and explained to the accused in the language of Kiswahill [which] is understandable to him

SGD: P.I KIMICHA- RM

17/5/2011"

We think the indication that the accused (the appellant) was absent on 17th May 2011 was an error because the handwritten proceedings indicate that he was present. Be it as it may, it is plain that the so called committal proceedings are glaringly problematic. In the first place it is conspicuous from the record that the subordinate court did not commit the appellant to the High Court for trial as required by section 246 (1) of the CPA. Secondly, the record does not show whether the appellant was addressed in the manner required by section 246 (3) of the CPA.

With respect, in the light of the unequivocal language in section 178 and 246 (1) of the CPA and the unambiguous pronouncement by the Court in the cases referred to shortly, we are unable to agree with

Ms. Itemba that the omission was not fatal on the authority of **Bahati Makeja's** case (supra). On the contrary, as the learned Principal State Attorney conceded, the lack of committal order had a bearing on the jurisdiction of the High Court to try the appellant. Unlike her, this is a case in which the use of the word meant that it was a necessary requirement and so non compliance with section 246 (1) of the CPA vitiated the proceedings before the High Court as well as the eventual judgment, conviction and the sentence. Accordingly, we are constrained to accede to the invitation by the learned advocate for the appellant by nullifying the proceedings as we hereby do and quash the judgment from it. We also quash the conviction and set aside the sentence meted out to the appellant.

Having so held, the next question for our consideration and determination is the way forward in the light of the wanting committal order. The learned counsel had opposing views whether or not this is a fit case for ordering a retrial. Luckily, the test to be applied is whether or not a retrial should be ordered is legendary. It stems from the decision of the defunct East African Court of Appeal in **Fatehali Manji v. Republic** [1996] EA 343 in which our predecessor addressed the issue and held that a retrial can only be ordered if it is in the interest of

justice to do so and not where such a course of action will be used by the prosecution to fill in the gaps on the already weak and insufficient evidence. We have followed that decision in various cases so much so that one need not cite any example. However, for the sake of completeness we shall cite a few namely: **Rashid Kazimoto and Another v. R** [2019] TZCA 464 at www.tanzlii.org., **Sultan Mohamed v. R**, Criminal Appeal No. 176 of 2003 (unreported), **Halfan Ismail @ Mtepela v. R** [2019] TZCA 195 www.tanzlii.org and **Maurious s/o Simwanza & Edward s/o Chikwema @ Jeshi v. R.** [2019] TZCA 151 www.tanzlii.org.

Guided by the principle laid down in **Fatehali Manji** (supra), we do not think this is a fit case for ordering a retrial. We shall demonstrate. It is plain that the effect of the order nullifying the proceedings before the High Court will result in directing the subordinate Court to act in accordance with section 246 (1) of the CPA consistent with what the Court did in **Asafu Tumwine's** case (supra). That means that the subordinate court will have to commit the appellant to the High Court for trial with the same witnesses listed by the prosecution. Once that is done the prosecution will have to prosecute its case by calling the witnesses it listed excluding PW3, PW4 and PW6. Naturally, the

prosecution will have to call PW1 and PW2 to prove its case but their evidence is not free from doubts as we shall endeavour to demonstrate.

As seen above, during the fateful trial, the only direct evidence came from PW1 who is shown to be the eye witness. According to his evidence (at p. 29, 30 and 31), the appellant poured one litre of hot water to the deceased standing 3 metres away. His further evidence was to the effect that the deceased was wearing a skirt and blouse and that for two days he remained at the scene of crime before departing to Mchome village, the deceased had not exhibited any sign of injury and was eating and walking normally. PW1 is also on record telling the trial court that he was of the same age with the appellant. In addition, PW1 told the trial court that the appellant threatened him not to disclose the act to any one lest he face the same punishment. However, as submitted by Mr. Nkoko, and in our view rightly so, PW1 was no longer under any threat by failing to disclose to her aunt; the deceased's mother, what had befallen the deceased in the hands of the appellant two days later after visiting her at Mchome Village. Under normal circumstances, it is inconceivable that PW1 could have been so coward to a person with the same age away from him and fail to disclose such an incident to the mother of the victim of such young age as five years.

Furthermore, our examination of the record does not show what efforts PW1 made to stop the appellant from doing what he is alleged to have done to the deceased. In our view, all aspects taken into account, PW1's evidence cannot be said to be reliable. It raises several doubts about his credibility. We entertain serious doubt that such evidence will be capable of proving that the appellant killed the deceased as held by the High Court. In the absence of any other evidence, PW1's word remained a word against the appellant's which required some other evidence to back it up. That evidence is wanting and so it will be unsafe and against the interest of justice ordering a retrial to give opportunity to the prosecution to fill the gaps.

In view of the lingering doubts in the evidence of the witness who claimed to have been an eye witness, those doubts cannot be made good by PW2's evidence. As submitted by Mr. Nkoko, PW2 prevaricated in relation to the deceased's' cause of death. She gave different versions of the cause of death that is; scald burns, septicaemia, or hypovolemic shock. Whilst admitting that the hospital from where she worked had no sufficient equipment to diagnose the deceased, yet at page 31 of the record, she opined that the burning was 50%. If one compares PW1's version of evidence that the amount of hot water was one litre poured

on the deceased who was wearing clothes and standing at three metres away, it is hard to accept PW2's evidence that the deceased died of severe burning of 50% and at the same time conclude that she died from septicaemia or hypovolemic shock.

Under the circumstances, it seems to be unsafe to order a retrial which will only assist the prosecution to patch up its already weak evidence from PW1 and PW2.

We are alive to our previous decision in **Mathias Bundala's** case (supra) cited to us by Ms. Itemba holding that the cause of death may not necessarily be proved through a postmortem report. However, we think she will undoubtedly appreciate the nature of the death of the deceased in that case left no doubt that no other person could have killed the deceased than the appellant. That is not the case in this appeal and so that decision is distinguishable from the facts in this appeal.

The upshot of the foregoing is that we endorse the submissions by the appellant's learned advocate against ordering a fresh trial.

In the event, having nullified the proceedings and judgment of the High Court, we quash the appellant's conviction and set aside the

sentence and substitute it with an order allowing the appeal and the immediate release of the appellant from custody unless held therein for another lawful cause.

Order accordingly.

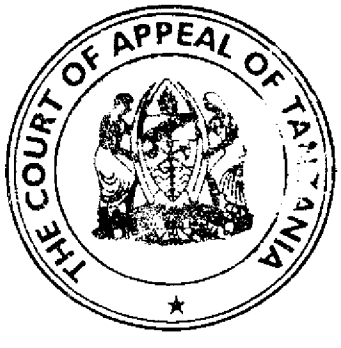
DATED at **DAR ES SALAAM** this 19th day of June, 2020.

R.E.S. MZIRAY
JUSTICE OF APPEAL

M.A. KWARIKO
JUSTICE OF APPEAL

L.J.S. MWANDAMBO
JUSTICE OF APPEAL

The Judgment delivered this 24th day of June, 2020 in the presence of the appellant in person and Mr. Costantine Kakula, learned Senior State Attorney for the respondent is hereby certified as a true copy of the original.



H. P. NDESAMBURO
DEPUTY REGISTRAR
COURT OF APPEAL