IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: MKUYE, J.A., MWAMBEGELE, J.A., And LEVIRA, J.A.)

CRIMINAL APPEAL NO. 411 OF 2017

SABASABA ENOS @ JOSEPH.....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

(Appeal from the Decision of the High Court of Tanzania at Mwanza)

(Bukuku, J.)

dated the 9th day of June, 2017

in

Criminal Sessions Case No. 28 of 2007

JUDGMENT OF THE COURT

19th & 29th April, 2021

MKUYE, J.A.:

The appellant, Sabasaba Enos together with another who is not subject to this appeal were charged with two counts of murder, each contrary to section 196 of the Penal Code, Cap 16 R.E. 2002. In the 1st count, it was alleged that Sabasaba Enos @ Joseph and Obedi Ntendele @ Katole on or about 19th day of February, 2015 at about 23:00 hrs at Nyamalulu B Village within Geita District in Mwanza Region, murdered one, Joseph Kubona.

In the 2nd count, it was alleged that Sabasaba Enos @ Joseph and Obedi Ntendele @ Katole on or about 19th day of February, 2015 at about 23:00 hrs at Nyamalulu B Village within Geita District in Mwanza Region, murdered one, Lucia Mpogoni.

Upon a full trial which was conducted following an order of this Court for a retrial in Criminal Appeal No. 135 of 2015 between the appellant and Republic, the High Court of Tanzania at Mwanza found the appellant guilty and it convicted and sentenced him to a mandatory punishment for murder which is death by hanging.

Aggrieved with that decision, the appellant has appealed to this Court. He initially, on 11th April, 2019 lodged a memorandum of appeal consisting four (4) grounds of appeal. However, on 9th April, 2021, the counsel who was assigned a dock brief for this matter filed another memorandum of appeal with three grounds of appeal which, for reasons to become apparent shortly, we do not intend to reproduce them. After having examined the grounds from both memoranda of appeal, we have agreed to deal with the 4th ground of appeal in the memorandum of appeal filed by the appellant himself as, we think, it has the effect of disposing of the matter without necessarily dealing with other grounds. The said ground reads as follows: -

"That the trial Judge did not append her signature after taking down the evidence of every witness. This incurable irregularity vitiates and nullifies the trial proceedings of the High Court. Thus, in the interest of justice, the retrial of the case will further injustice (sic) affect the appellant who is under the custody for more than fourteen (14) years on faults somehow caused by irregularities of the court procedures"

When the appeal was called on for hearing, the appellant was represented by Mr. Cosmas Tuthuru, learned advocate whereas the respondent Republic had the services of Ms. Rehema Mbuya, learned Senior State Attorney assisted by Mr. Moris Mtoi and Ms. Janeth Kisibo, both learned State Attorneys. Both sides submitted extensively on all grounds of appeal and we are grateful for that. However, we shall deliberate on the lone ground of appeal reproduced above.

Submitting in support of the said ground of appeal, Mr. Tuthuru argued that the trial judge did not append her signature at the end of each witness's evidence. However, in a strange manner he submitted that the anomaly was not fatal as it is curable under section 388 of Criminal Procedure Act, Cap 20 RE 2019 (the CPA). He was of the view that, at any rate, the appellant will not be prejudiced by such anomaly.

In response Ms. Mbuya conceded that the trial judge did not sign at the end of each witnesses' evidence. However, unlike her learned friend, she forcefully contended that failure to sign in the proceedings was a fatal anomaly as it does not show the authenticity of the proceedings. She added that, failure to do so vitiates the proceedings as it depicts unfair trial. To support her argument, she referred us to the case of **Yohana Mussa Makubi v. Republic,** Criminal Appeal No. 556 of 2015 (unreported). She then, urged the Court to invoke its revisional powers under section 4 (2) of the Appellate Jurisdiction Act, Cap 141 RE 2019 (the AJA) and nullify the proceedings and judgment, quash the conviction and set aside the sentence and order a retrial having regard to the seriousness of the offence.

In rejoinder, Mr. Tuthuru resisted the learned Senior State Attorney's prayer for an order of retrial. He argued that a retrial was not the best remedy as the evidence is not watertight to support a retrial. In his view, this was a fit case for ordering the release of the appellant from custody.

The main issue for our determination is whether the trial judge failed to append her signature at the end of witnesses' testimonies and, if the answer is in the affirmative, what is the effect of such anomaly.

Recording of evidence in criminal matters is governed by section 215 of the CPA read together with the Criminal Procedure (Record of Evidence) (High Court) Rules, GN Nos. 28 of 1953 and 286 of 1956. Essentially Section 215 of the CPA empowers the High Court (now the Chief Justice) to make rules from time to time prescribing the manner in which evidence shall be recorded in cases coming before the High Court, and manner the evidence or substance thereof is to be taken down is provided for under those Rules.

The Rules which are made under section 215 of the CPA, that is GN Nos. 28 of 1953 and 286 of 1956, guide the recording of evidence. Rule 3 thereof states as follows: -

> *"In all trials of criminal cases before the High Court the record of the evidence of each witness shall consist:*
>
> *(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 type written 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."*

In relation to subordinates courts, the manner of recording the evidence is provided for under section 210 (1) of the CPA. Relevant to our appeal is section 210 (1) (a) which states as follows: -

"In trials, other than trials under section 213, by or before the 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 form part of the record".* [Emphasis added].

According to the above quoted provisions of the law, it seems to us that unlike in section 215 read together with rule 3 of GN. Nos 28 of 1956 and 286 of 1956 which do not mandatory require the trial judge to sign the evidence, section 210 (1) (a) of the CPA provides in mandatory terms the requirement to the trial magistrate to ensure that he signs at the end of the witnesses' evidence. This position was also taken in the case of **Amir Rashid v. Republic**, Criminal Appeal No. 187 of 2018 (unreported) where the Court discussed the import of section 210 (1) (a) of the CPA and stated as follows:

> *"The quoted provision [section 210 (1) (a)] is coached in mandatory terms implying that it is imperative that a presiding magistrate has to ensure that he appends his signature after the end of each witness' testimony. The rationale is not hard to find. It lends assurance that such evidence was recorded by an authorised person."*

The issue of the disparity in the gist of the provisions governing the recording of evidence in the High Court and subordinate courts was dealt with in the case of **Yohana Mussa Makubi** (supra) where like in this case, the trial judge did not append her signature after the conclusion of the testimony of every witness.

In that case, the Court after revisiting section 356 of the Indian Criminal Procedure Code which is in *pari materia* with section 210 (1) (a) of the CPA observed that 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 Court then, went on to resolve the issue of a long-established rule of practice as opposed to the rule of law and it cited with approval the case of **Laurent Salum & 5 others v. Republic**, Criminal Appeal No. 176 of 1993 (unreported) in which a similar issue of a long-established rule of practice was discussed and stated as follows:

> *"...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 the country.*

Then the Court found that the issue of signing after the end of every witnesses' evidence is a long-established rule of practice which the trial judge ought to have observed.

The importance of appending signature was underscored by the High Courts' decision which we subscribe in the case of **Richard**

Mebolokini v. Republic [2000] TLR 90 at page 94 when discussing section 210 (1) of the CPA in that:

> *"The signing is not a mere formality which can be dispensed with impunity. It signifies not only that the said evidence was written by the magistrate himself or herself or in his presence, hearing and under his personal impeccable assurance to its authenticity.*
>
> *Such evidence, in my considered opinion, can form part of the record of proceedings if so recorded and signed. It is therefore highly dangerous to act on unsigned evidence (at least on appeal) because there is no guarantee that it was the very evidence which was recorded by the trial magistrate in the presence of the parties concerned. When the authenticity of the record is in issue, noncompliance with section 210 may be prove fatal."*

In this case, the record of appeal bears out that in every occasion except when Dahahile Joseph (PW3) testified, the trial judge did not append her signature. According to the record of appeal five witnesses testified for the prosecution and for the defence, only the appellant testified. Martha Joseph (PW1) testified from page 3 to page 6 but at

the end of her testimony at page 6 of the record of appeal, the trial judge did not append her signature. PW2, one, Charles Mwenhela adduced his evidence from page 6 up to page 8 of the record of appeal but the same way the trial judge did not sign at the end of his testimony. PW4, Koroboi Manyanda's testimony is found at page 11 to 13 of the record of appeal and when he completed to testify the trial judge did not append her signature at the end of his testimony. Likewise, Prosper Albinus who testified as PW5 as shown at pages 13 to 14 of the record of appeal had his testimony not singed by the trial judge.

Even when the appellant testified as DW1 as shown from pages 15 to 17 of the record of appeal, the trial judge did not append her signature at the end of his testimony.

When faced with an akin scenario in the case of **Yohana Mussa Makubi** (supra), the Court held that such anomaly amounted to an incurable irregularity. It stated that:

> *"We are thus satisfied that the 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 therefrom."

[See also: **Chacha Ghati Magige v. Republic,** Criminal Appeal No. 406 of 2017 (unreported)]

Even in this case, going by the above cited case, we are, indeed, satisfied that the trial judge did not append her signature particularly after PW1, PW2, PW4, PW5 and DW1 had concluded their testimonies. Guided by the above cited authority, we are of the view that this does not offer assurance that the trial proceedings are authentic and not tainted. It is obvious that it amounted to an incurable irregularity as it cannot be cured by section 388 of the CPA as the learned counsel for the appellant seemed to suggest. In the result, we find that the omission vitiated the entire proceedings of the trial court and thus they are a nullity.

Consequently, we allow the appeal and proceed to nullify the proceedings and judgment, quash the conviction and set aside the sentence meted out against the appellant. Besides that, we have

considered Mr Tuthuru's proposition that a retrial may not be the best option but we think it cannot stand in the circumstances of this case. Considering the nature of this case; and that two persons were killed, we order a retrial before another judge with a new set of assessors.

It is so ordered.

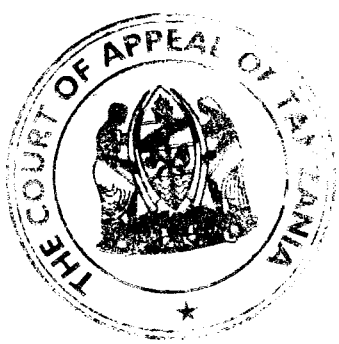
DATED at **MWANZA** this 28th day of April, 2021.

R. K. MKUYE
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

The judgment delivered this 29th day of April, 2021 in the presence of the appellant in person, and Miss Georgina Kinabo, learned State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.



E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL